Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY,

Respondent.

On Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of Berkeley has disqualified the Berkeley Sea Scouts from the city's program allowing free berthing at the Berkeley Marina for community-oriented nonprofit organizations necessitating that Petitioner Evans personally pay the berth fees. The Sea Scouts have been excluded because of their affiliation with the Boy Scouts of America, and because the City contends that the Boy Scouts' belief-based membership policies conflict with city anti-discrimination rules.

1. Does refusing access to a generally available government program, facility, or benefit, on the basis of an applicant's philosophically based viewpoints or associations (and actual adherence to those viewpoints and associations), violate the First Amendment freedom of belief and association?

2. Does refusing access to a generally available government program, facility, or benefit, on the basis of an applicant's philosophically based viewpoint or associations (and actual adherence to those viewpoints and associations), violate equal protection of the laws under the Fourteenth Amendment and the principle that government must be viewpoint neutral in allocating benefits and making public facilities available?

PARTIES TO THE PROCEEDING

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PETITION FOR WRIT OF CERTIORARI

Eugene Evans, respectfully petitions this Court for a writ of certiorari to review the judgment of the California Supreme Court.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 38 Cal. 4th 1, 40 Cal. Rptr. 3d 205, 129 P.3d 394 (2006), and is included in Appendix (App.) A. The opinion of the California Court of Appeal is reported at 127 Cal. Rptr. 2d 696 (2002), and is included in App. B. The opinion of the Superior Court of Alameda County, California, is not reported and is included in App. C.

JURISDICTION

The judgment of the California Supreme Court was entered on March 9, 2006. No petition for rehearing was sought. The time to file this petition was extended to July 7, 2006, by Justice Kennedy's order of June 5, 2006, Appendix E. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS AT ISSUE

The First Amendment to the United States Constitution provides in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."

The Fourteenth Amendment, Section 1, of the United States Constitution provides in pertinent part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

City of Berkeley Resolution 58,859-N.S. provides in pertinent part, "The Berkeley Marina advocates and practices equal opportunity in terms of access to its berthing facilities. Availability and use of the facilities will not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition."

STATEMENT OF THE CASE

The facts stated are those found by the California Supreme Court decision at issue (App. A) as augmented by the First Amended Complaint (App. D). Under California law, on demurrer, all material facts properly pleaded are admitted. App. A-1. As set forth in *Boy Scouts of America v. Dale*, 530 U.S. 640, 648-49 (2000), "Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression." The complaint is provided for that purpose.

Petitioner Eugene Evans has been a participant in the Berkeley Sea Scout program (Sea Scouts) since joining at age 13 in 1957. Petitioner is the most senior of the active Sea Scouts, and is the Skipper of Sea Scout Ship #44, the *Farallon*, and at the time this action was filed had been a Sea Scout Skipper for over 27 years. Petitioner, a practicing California credentialed teacher, now personally pays over $500 per month in berth fees on behalf of the Sea Scouts. As a result, Petitioner can no longer afford to pay the membership fees of impoverished youths, resulting in loss of membership in the Sea Scouts, and the Sea Scouts have had to scale back community outreach and formerly free services and events such as cruises, meals, and overnight camping trips which Petitioner formerly paid for. Petitioner was duly authorized, together with the other plaintiffs below, to bring this action in a representative capacity

on behalf of the other Sea Scout program participants, past and future. App. D-6-D-7.

The Sea Scouts are a nonprofit association with no formal administrative structure affiliated with the Boy Scouts of America (BSA). The Sea Scouts run an unfunded program with no budget and no paid employees. The adult members, including Petitioner, use Sea Scout vessels to teach sailing, seamanship, marine engine repair, electrical repair, woodworking, and other skills for a maritime career, as well as teamwork, to teenagers who pay no more than $7 a year to participate. Ethnic diversity is a hallmark of the Sea Scouts, and many youth participants are economically disadvantaged. App. A-2.

The Sea Scouts operate under BSA's regional office, the Mount Diablo Council. Each Sea Scout "ship" functions as the equivalent of a Boy Scout troop. BSA provides the group with a low-cost maritime liability insurance policy, but gives it no direct funding. BSA follows a constitutionally protected policy of excluding avowed homosexuals and atheists. *Dale*, 530 U.S. 640. In the late 1930's, the City of Berkeley, California, began giving BSA one or more free berths at its marina for use by the Sea Scouts after the Mount Diablo Council permitted Berkeley to quarry rock from BSA property to build the marina and breakwater. The arrangement was formalized by city resolutions in 1945 and 1969 that required compliance with marina rules and regulations and allowed revocation on 30 days' written notice. App. A-2-A3.

In March, 1997, the Berkeley City Council adopted through Resolution 58,859-N.S. a uniform policy for awarding free berths to nonprofit community service organizations. The resolution provided that an organization seeking free berth space must "supply a beneficial public service," the benefit of which "greatly exceeds the value of the berth." The organization also must demonstrate, through membership policy

and practices, that it promotes cultural and ethnic diversity. The resolution further specified that access to marina facilities may not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability, or medical condition. The resolution directed the Berkeley Waterfront Commission to review applications and make recommendations to the City Council. When the Sea Scouts' participation came up for review in early 1998, the Waterfront Commission expressed concern that BSA's policy relating to homosexuals and atheists conflicted with Resolution 58,859-N.S. and asked the Sea Scouts to provide a "local policy statement" ensuring nondiscrimination. The Sea Scouts, in negotiation with the Mount Diablo Council, approved a policy statement intended to satisfy Berkeley's requirements. App. A-3-A-4.

In its April 8, 1998, letter to the Waterfront Commission manager, the Sea Scouts stated:

> We will continue to comply with the Constitution of the United States of America, the laws of the State of California and the Berkeley Municipal Code—including Section 13.28.060 and City Council Resolution No. 58,85[9], N.S. [¶] . . . We actively recruit adult leaders and adolescents meeting the minimum age requirements without regard to sex, race, color, national origin, political affiliation, religious preference, marital status, physical handicap or medical condition. We believe that sexual orientation is a private matter, and we do not ask either adults or youths to divulge this information at any time.

App. A-4-A5.

The Waterfront Commission recommended that the City Council continue the Sea Scouts' free berths. App. A-5.

Nonetheless, on May 5, 1998, the Berkeley City Council voted to disqualify the Sea Scouts from participating in the program of free access for community service organizations. According to the council minutes, the free berths were discontinued "due to [BSA's] discriminatory policies against gays and atheists." In a letter notifying the Sea Scouts of this action, the Berkeley Waterfront Manager stated the City Council had denied free berths to the Sea Scouts because the Sea Scouts "were associated with the national Boy Scouts of America organization which has a national policy of discriminating based on sexual orientation and atheism." App. A-6-A-7.

Petitioner and other Sea Scout participants filed suit in Alameda County, California, Superior Court, citing in their complaint violation of their First Amendment rights of speech and association and Fourteenth Amendment equal protection rights under the United States Constitution, among other causes of action. App. D-29. The superior court sustained a demurrer to Petitioner's First Amended Complaint without leave to amend and entered a judgment dismissing the entire action with prejudice. App. C-3-C-4. Those same federal rights were raised on appeal to the California Court of Appeal which affirmed the judgment dismissing Petitioners' federal and other claims. App. B-16. Further review of those federal rights was sought in a petition to the California Supreme Court which also dismissed Petitioner's federal claims. App. A-26. The decision of the court below, review of which is sought, directly concerns the federal issues raised in this petition—the First and Fourteenth Amendments to the United States Constitution. App. A-8.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE CONSTITUTIONALITY OF WITHHOLDING GENERALLY AVAILABLE PUBLIC BENEFITS FROM POLITICALLY DISFAVORED ORGANIZATIONS

A. The Decision Below Conflicts with This Court's Decisions on Freedom of Speech and Association

The court below held that under this Court's precedents, the fact that Berkeley's nondiscrimination requirement applied only to programs assisted by a city subsidy in the form of free berths is "virtually dispositive." App. A-9. The court ignored the requirement that where a state antidiscrimination law impacts the freedom of association, the proper standard of review is traditional First Amendment analysis. *Boy Scouts of America v. Dale*, 530 U.S. at 658-59. Content-based restrictions on speech are constitutional only if they withstand strict scrutiny. *See Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). The California court failed to apply that standard.

Berkeley terminated the Sea Scouts' free berth participation because they "were associated with the national Boy Scouts of America which has a national policy of discriminating based on sexual orientation and atheism." App. A-6-A-7. The California court found that "Berkeley, in conditioning free berths on a group's adoption of a nondiscriminatory membership policy, has not prohibited or penalized plaintiffs' exercise of speech or associational rights." App. A-12. The court disregarded this Court's ruling that the First Amendment "right to freedom of association is a necessary

correlate to the constitutionally protected freedom of speech." *Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984) (*Jaycees*). Infringement "on this freedom can take a number of forms" including penalties or withholding benefits from individuals *because of their affiliation with a disfavored group*. Government "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent." *Healy v. James*, 408 U.S. 169, 187-88 (1972).

In *Healy*, students sought to form a local college chapter of Students for a Democratic Society (SDS) and receive official recognition of their organization by the college, entitling the organization to use campus facilities to hold meetings. However, SDS had been "a catalytic force" (408 U.S. at 171) in unlawful disruptions of college campuses across the nation. The college president therefore denied recognition to the chapter. The students sued, alleging abridgment of expressive and associational rights. This Court, ruling for the students, noted that it "consistently [had] disapproved governmental action . . . denying rights and privileges *solely because of a citizen's association with an unpopular organization.*" *Id.* at 185-86 (emphasis added). Instead, to justify sanctions, government must "establish" (1) a "knowing affiliation with an organization *possessing unlawful aims and goals,* and [(2)] *a specific intent to further those illegal aims.*" *Id.* at 186 (emphasis added). But the aims and goals objected to by Berkeley are not unlawful.

Dale, 530 U.S. at 660, declares BSA membership policies to be not just lawful, but constitutionally protected. Federal and state statutes mandate the same result. Thus, 20 U.S.C. § 1681(a)(6)(B) specifies that the ban on discrimination based on sex in any education program or activity receiving federal financial aid is not applicable to the membership policies of the Boy Scouts. 20 U.S.C. § 7905(b)(1) requires that "*[n]otwithstanding any other provision of law*," public schools receiving federal aid may not deny equal access to or

discriminate against "any group officially affiliated with the Boy Scouts . . . based on the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America." (Emphasis added.) 42 U.S.C. § 5309(e) declares that no state or unit of local government that has a designated open forum, limited public forum, or nonpublic forum and that receives assistance under this chapter of the Housing and Community Development Act shall deny equal access or discriminate against any youth organization, specifically including the Boy Scouts of America and its affiliated groups, that wishes to participate in that forum. To similar effect, California law provides that no state or local agency may charge a "youth group," specifically defined to include the Boy Scouts, more than other similar groups for access to a public beach or recreation area. Cal. Gov't Code § 53077.5(b) and (a)(5). Cal. Rev. & Tax Code § 214(a) exempts BSA from taxation and the Boy Scouts are specifically exempted from certain sales and use taxes. Cal. Rev. & Tax Code § 6361(b)(3).

The court below's holding that the right of association is not abridged by punitive action that stops short of outright prohibition on free association, App. A-12, has been rejected by this Court. "[T]he Constitution's protection [of free association] is not limited to direct interference with fundamental rights." *Healy*, 408 U.S. at 183. Thus in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), "[t]he requirement . . . that the NAACP disclose its membership lists was found to be an impermissible, *though indirect*, infringement of the members' associational rights." *Healy*, 408 U.S. at 183 (emphasis added). Similarly, in *Healy*, the fact that a student group wrongly proscribed from campus could still freely associate outside of campus did not "ameliorate significantly the disabilities" of being kept off campus. *Id.*

The First Amendment right of freedom of association includes the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and

cultural ends." *Jaycees*, 468 U.S. at 622. Petitioners' recreational and skill building activities, App. A-2, under the supervision of adult leaders, advance Sea Scout expressive goals just as surely as BSA instills organizational "values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing" where values-laden lessons are taught during the encounters. *Dale*, 530 U.S. at 649.

In *Rumsfeld v. Forum for Academic & Institutional Rights*, ___ U.S. ___, 126 S. Ct. 1297, 1312 (2006), this Court cited *Healy*, 408 U.S. at 180-84, for the principle that the First Amendment prohibits government from imposing penalties or withholding benefits based on membership in a disfavored group. Thus, in *Elrod v. Burns*, 427 U.S. 347 (1976), when individuals were terminated from at-will government jobs solely because of their affiliation with a disfavored political party this Court found that such dismissals "severely restrict" associational rights protected by the First Amendment. *Id.* at 372. *See also Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In none of these cases did this Court inquire into whether the retaliation victim shared every specific belief of the expressive organization with which he was affiliated; affiliation was protected—and retaliation rejected—without regard to the extent to which the member shared the beliefs of the larger organization.

Jaycees noted that unconstitutional government actions against freedom of association "can take a number of forms . . . . [including imposing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group." 468 U.S. at 622. This is precisely what Berkeley has done, and the court below approved, App. A-6-A-8, by withholding a benefit generally available to nonprofit organizations solely because of the Sea Scouts' association with BSA, a disfavored group.

In sum, by punitively excluding the Sea Scouts from the program of free-berthing for nonprofits, Berkeley curtailed their constitutionally recognized expressive associational activities much as the college in *Healy* infringed associational rights by denying a group of students official recognition and benefits because of their affiliation.

B. The Decision Below Conflicts with This Court's Decisions on Viewpoint Discrimination

The court below upheld Berkeley's exclusion of the Sea Scouts, including Petitioner, from a generally available program on viewpoint related grounds. App. A-8. This exclusion violates the viewpoint neutrality mandate laid down by this Court. Once it has created, by its own discretion, a program or subsidy available to members of the public, government cannot then pick and choose recipients on the basis of their viewpoint. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Even in a nonpublic forum, government may not discriminate based on a speaker's viewpoint. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). In *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), this Court struck down the exclusion of a community group from public school facilities because it wanted to present a film addressing family issues from a particular viewpoint—in fact, a religious perspective. This Court declined to address what kind of forum the school facilities represented, but instead found that even if the school facilities amounted to a nonpublic forum, the exclusion of the expressive group was unconstitutional because the exclusion was viewpoint motivated. *Id.* at 393-94. Thus even if the free berthing program from which Berkeley has excluded the Sea Scouts is not a public forum, limited or otherwise, the exclusion violates the First Amendment because it targets and punishes

the constitutionally protected viewpoints that Berkeley attributes to the Sea Scouts.

1. The Prohibition of Viewpoint Discrimination Applies to the Granting of Subsidies

The court below held as "virtually dispositive" the fact that Berkeley's nondiscrimination policy applied only to what the court characterized as a city subsidy. App. A-9. In fact, what is at issue is the Sea Scouts' exclusion from a generally available program allowing nonprofits the free use of the marina facilities. This is no more of a "subsidy" than the free use of school facilities in *Lamb's Chapel*. In any event, *Rosenberger* makes clear that the prohibition of viewpoint discrimination applies even in the granting of monetary subsidies. There, this Court invalidated as impermissible viewpoint discrimination a public university's policy of denying subsidies to journals expressing religious viewpoints while providing subsidies to journals with other viewpoints. 515 U.S. at 837. This is comparable to the Sea Scouts' situation: they have been denied free-berthing that Berkeley is making available to other nonprofits on the basis of what Berkeley alleges to be the Sea Scouts' viewpoint, or at least the viewpoint of BSA with which the Sea Scouts are associated. *Rosenberger* condemned such viewpoint-based discrimination holding that "the government offends the First Amendment when it imposes financial burdens . . . based on the content of [one's] expression." 515 U.S. at 828. A financial burden is precisely what Berkeley has imposed on Petitioner by excluding the Sea Scouts from the free-berthing program—alone among nonprofits that have applied for that program—because of the politically incorrect content of certain expressive policies that Berkeley has attributed to Petitioners.

The court below relied on the statement in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540,

541 (1983), that the government's "decision not to subsidize the exercise of a fundamental right does not infringe that right and thus is not subject to strict scrutiny." App. A-10. However, this Court has made clear that the viewpoint neutrality requirement applies to the government's distribution of all sorts of valuable benefits, including subsidies. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) ("[E]ven in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'" (quoting *Regan*, 461 U.S. at 550)).

The lower court, App. A-11, relied heavily on *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), as "the closest case on point." There, a federal statute required recipients of federal education funds to agree not to discriminate on the basis of sex. When the college refused to sign the standard "Assurance of Compliance" form, the government terminated its tuition assistance to the college's students. *Id.* at 560-61. The California court, however, neglected to note that *Grove City* was grounded on Congress' Spending Clause power. *Id.* at 575 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Berkeley does not enjoy any similar constitutional spending power which resides exclusively in Congress. U.S. Const. art. I, § 8, cl. 1.

Moreover, after discussing *Grove City*, *Rumsfeld* cited "other decisions" that "recognize a limit on Congress' ability to place conditions on the receipt of funds," 126 S. Ct. at 1306, including *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003). That case held "that 'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Rumsfeld*, 126 S. Ct. at 1307. Under this unconstitutional conditions principle, a law would be unconstitutional if government could not directly require the recipient of funds to do the acts necessary to receive the funds. *Id.* This Court held: "Because the First Amendment would not

prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds." *Id.*

This Court's decision in *Dale*, 530 U.S. 640, makes clear that Berkeley could not directly require BSA or the Sea Scouts to admit atheists and homosexuals. In holding that Berkeley may attempt to accomplish that same end by withholding funds available to every other nonprofit organization, the decision below is in direct conflict with *Rumsfeld*.

2. Viewpoint Discrimination Is Permissible Only When Government Institutes a Program or Subsidy as an Instrument of Expressing Its Own Message or to Perform Its Governmental Functions

This Court has permitted viewpoint discrimination in the awarding of subsidies only in the very specific situation where the government has established a program or a funding arrangement by which the government "*itself* speak[s] or subsidize[s] transmittal of a message." *American Library Ass'n*, 539 U.S. at 213 n.7 (quoting *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001)) (emphasis added). The free-berthing program does not present a message of any kind. It merely provides for recreational activities in the Berkeley Marina. Thus the limited context in which subsidies may be distributed with viewpoint discrimination is not applicable here.

C. The Decision Below Conflicts with This Court's Decisions on Compelled Speech

At the March 11 and April 8, 1998, meetings of the Waterfront Commission, Berkeley public officials set out as a condition for the Sea Scouts to continue to receive free berthing, that Petitioners must disseminate, advocate, and proselytize Berkeley's viewpoint on sexual orientation

discrimination to the BSA in efforts to change the BSA's national policies regarding gays and atheists. App. D-18-D-20.

Rumsfeld notes that this Court's "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." 126 S. Ct. at 1308. Government's desire to compel dissemination of its ideological message cannot outweigh a private individual's First Amendment right to avoid becoming the carrier for such message. *Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977). If government were freely able to compel citizens to propound political messages with which they disagree, protection of a citizen's freedom of speech would be empty. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 575-76 (1995).

Berkeley may believe that the BSA's membership policies are immoral, but this Court has stated that government may not legislate solely to impose its own ideology upon individuals or groups. "The issue is whether the majority may use the power of the State to enforce [its] views on the whole society through operation of the . . . law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'" *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992)).

Berkeley has interfered with the Sea Scouts', including Petitioner's, speech for the purpose of promoting Berkeley's "politically correct" message and discouraging the message disfavored by Berkeley, the national BSA's policies. However, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

The right to silence is constitutionally protected; one cannot be compelled to speak out or to disseminate government ideology. *Wooley*, 430 U.S. at 714-716; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Private individuals have the right not to propound a particular point of view. *Hurley*, 515 U.S. at 575.

Further, government actions that unconstitutionally burden the freedom of association "may take many forms, one of which is 'intrusion into the internal structure or affairs of an association.'" *Dale*, 530 U.S. at 648 (quoting *Jaycees*, 468 U.S. at 623). By compelling the Sea Scouts to proselytize Berkeley's viewpoints to BSA—and thereby attempting to turn a Sea Scout unit of BSA against the national BSA organization—Berkeley impermissibly interfered with the internal structure and affairs of BSA and the Sea Scouts.

The California Supreme Court dismisses these requirements stating that had the City Council accepted the Waterfront Commission's recommendations of compelled speech to obtain a change in national BSA policy, the Sea Scouts "might with greater plausibility contend the conditions infringed their freedom of speech." App. A-19. This statement ignores the fact that the Sea Scouts had already been required to comply with the Waterfront Commission's demands as a condition of its recommendation. App. D-21, D-23-D-24. But even after this compelled speech was accomplished, the City Council voted to deny the Sea Scouts the continued free use of the Berkeley Marina facilities for the stated reason that the Sea Scouts were associated with the national BSA which has a policy of exclusion based on sexual orientation and atheism. App. A-6-A-7. The lower court's upholding of this compelled speech conflicts with this Court's decisions cited above.

D. The Decision Below Conflicts with This Court's Precedents on Unconstitutional Conditions

The decision below held that Berkeley's requirement that the Sea Scouts document a nonexclusionary membership policy in order to qualify for the free berth program was not an unconstitutional condition. App. A-16-A-19. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), this Court explained that

> even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which it could not command directly."

(Citations omitted.)

This Court has not hesitated to strike down restrictions on speech that were unrelated to any "programmatic message of the kind recognized in *Rust* [*v. Sullivan*, 500 U.S. 173 (1991)." *Legal Services Corp.*, 531 U.S. at 548. Thus in *Legal Services Corp.*, the government could not condition grants to lawyers serving indigent clients on their agreement to refrain from challenging the constitutionality of welfare laws, since the grant program was not designed "to promote a governmental message." *Id.* at 534.

This case is disturbingly like *Rosenberger*, 515 U.S. at 833-36, in which a student publication could not both accept public university funds and maintain its religious viewpoint. So here, Sea Scouts cannot accept the benefit of free-berthing and maintain their association with BSA because of the viewpoint of BSA. They must unequivocally agree to refrain from exercising their constitutionally protected association with BSA and its membership policies or forego the free-berthing benefit.

The California Supreme Court broke new ground by permitting a city to assert its own locally generated interest that supersedes federal constitutional rights. App. A-9. Allowing municipalities to create their own "compelling local interests" for conditioning benefits on the relinquishment of constitutional rights results in inconsistent levels of protection of constitutional freedoms around the country, with enforcement of and respect for constitutional rights varying from city to city, depending on the ideological inclinations of the local government. This subverts the "very purpose of a Bill of Rights," which is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *Barnette*, 319 U.S. at 638.

In *Dale*, this Court considered whether the State of New Jersey had a compelling interest which would support the application of its antidiscrimination laws to the Boy Scouts' membership policies—the same policies at issue here. This Court concluded that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Dale*, 530 U.S. at 659.

Similarly, no local interest can justify Berkeley's infringement of the Sea Scouts' First Amendment rights. As this Court recognized in *Dale*, while local governments have the power to enact laws to combat discrimination against certain groups, the government has no legitimate interest in using those

laws to regulate the membership policies of private, expressive organizations. 530 U.S. at 658-59. This is in direct contrast to the interest the government has in upholding fundamental national policies. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (noting government's "fundamental, overriding interest in eradicating racial discrimination in education").

By contrast with *Bob Jones*, where national policy against racial discrimination had been shown by significant, sustained action by all three branches of government, there is no evidence of any policy supporting the regulation of the membership of private, expressive associations. Instead, the decisions of this Court, *see Dale*, and the actions of Congress, *see* 20 U.S.C. § 7905(b)(1), unequivocally support the right of Boy Scout groups to maintain their membership policies free from governmental interference. Accordingly, this Court in *Dale* has rejected the California court's holding that a local interest justifies the infringement of the Sea Scouts' First Amendment associational rights.

E. The Decision Below's Disregard of Petitioner's Fourteenth Amendment Equal Protection Rights Conflicts with the Decisions of This Court

1. The Decision Below Ignores the Fact That the Berkeley Resolution Was Targeted to Punish the Sea Scouts

Because of Berkeley's animus toward the viewpoints and membership policies of the BSA, Berkeley enacted a free berths program resolution intended to punish the Sea Scouts, including Petitioner, solely because of their association with the BSA. App. A-6-A-7; App. D-11.

The court below shrugged off statements by Berkeley officials of their intent to punish the Sea Scouts or

BSA for BSA's policies. App. A-24-A-25 and n.10. This is in direct conflict with this Court's decision in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). There this Court held that in equal protection cases, the City Council's object could be determined from, among other things, contemporaneous statements made by members of the decision making body. *Id.* at 540. This Court found that the ordinances were enacted because of, not merely in spite of, their suppression of the petitioners' religious practices as shown by the statements of various city officials. The ordinances were therefore not neutral. *Id.* at 541-42. Because the statements by Berkeley city officials showed that the city's denial of the free-berthing was intended to suppress the Sea Scouts' and BSA's First Amendment rights, the decision below conflicts with *City of Hialeah.*

2. The Decision Below Ignores the Fact That Berkeley Has Not Applied Its Marina Resolution in a Neutral Manner

The Sea Scouts in their April 8, 1998, letter promised in writing to

> continue to comply with . . . the laws of the State of California and the Berkeley Municipal Code—including Section 13.28.060 [prohibiting discrimination based on sexual orientation in city owned facilities, or services, such as the Marina] and City Council Resolution No. 58.850, N.S. [availability and use of the Berkeley Marina shall not be predicated upon a person's religion, sexual orientation and other factors].

App. A-4-A-5.

No other free-berth applicant at the Berkeley Marina was required to submit such a letter. The Sea Scouts were deliberately and specifically singled out and targeted by

Berkeley because of their association with an organization that Berkeley disliked. App. D-43. Indeed, other nonprofits, without ties to BSA, have been granted free use of the marina facilities without the same conditions imposed on Petitioners. App. D-21.

The "bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer v. Evans*, 517 U.S. 620, 634 (1996). *See also Lawrence*, 539 U.S. at 574. In none of the cases relied on by the court below, *Grove City*, 465 U.S. 555, *Bob Jones*, 461 U.S. 574, and *Regan*, 461 U.S. 540, did government target a group for punishment solely because of its association with an organization disfavored by the government.

This case is fundamentally different from *Grove City*, 465 U.S. 555, relied on by the California court, App. A-10-12. In *Grove City*, the college refused to sign a uniform, federally prescribed compliance statement stating it would comply with the Title IX requirements. 465 U.S. at 561. In contrast, the Sea Scouts *have* signed a "written assurance" of compliance with Berkeley's resolution and ordinance, as well as with the United States Constitution and California laws. App. A-4. But Berkeley kept changing its standards and demanding different things of the Sea Scouts. For instance, the Waterfront Commission accepted the Sea Scouts' written assurance as sufficient compliance on the condition that their April 8, 1998, letter be distributed to all Boy Scout members and persons associated with the Berkeley Sea Scout program and on the further condition that the Sea Scouts initiate a dialogue with the local BSA council on changing the national BSA policies regarding gays and atheists. App. D-20. No other free berth applicant was required to do anything comparable to this. App. D-21. Despite the Sea Scouts' compliance, the more ideologically driven Berkeley City Council rejected the Sea Scouts' application on the basis of their association with BSA. App. A-6-A-7, D-25.

The Equal Protection Clause precludes "intentional and arbitrary discrimination" by government even when the victims are not members of a traditionally suspect class. *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918). Government action that, in a targeted way, imposes a disability on a group of persons "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634. Where legislation is motivated by "animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id.* at 632. "'[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.' " *Id.* at 634 (citation omitted).

Because the decision below conflicts with the decisions of this Court on freedom of speech and association and equal protection, review should be granted pursuant to Rule 10(c) of this Court.

II

THE DECISION BELOW ADDS TO THE CONFLICT IN THE UNITED STATES COURTS OF APPEALS AS TO THE CONSTITUTIONALITY OF DISQUALIFYING POLITICALLY DISFAVORED ORGANIZATIONS FROM GENERALLY AVAILABLE PUBLIC BENEFITS

A. The Decision Below Upholding Berkeley's Viewpoint Discrimination Adds to the Existing Conflict in the Circuit Courts

The court below noted that Berkeley excluded the Sea Scouts from its program of free berthing for nonprofits "due to [BSA's] discriminatory policies against gays and atheists."

App. A-6. The court cited with approval the Second Circuit holding in *Boy Scouts of America v. Wyman*, 335 F.3d 80, 94 (2d Cir. 2003), that exclusion of BSA from the state's workplace charitable contribution campaign because of its membership policies was viewpoint neutral because the purpose was to protect persons from the economic and social harms of discrimination rather than to impose a price on the expression of BSA's point of view. App. A-14. In plain terms, both this case and *Wyman* punished BSA, and here the Sea Scouts, including Petitioner, because of their politically disfavored exercise of the right of association.

The holdings of the California Supreme Court in this case and of the Second Circuit in *Wyman* are in direct conflict with the holding of the Eighth Circuit in *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004), *cert. denied, sub nom. Rahn v. Robb*, 543 U.S. 1054 (2005) (*Robb*). There the Eighth Circuit ruled that the State of Missouri, in requiring a local unit of the Knights of the Ku Klux Klan to abandon its racially restrictive membership policy as a condition of participating in the state's Adopt-A-Highway program, violated that group's constitutionally protected right of association. *Id.* at 738, reaffirming its earlier holding in *Cuffley v. Mickes*, 208 F.3d 702, 704, 708-10 (8th Cir. 2000), *cert. denied, sub nom. Yarnell v. Cuffley*, 532 U.S. 903 (2001).

In *Cuffley*, the state denied the Klan's participation on the basis that the Klan did not satisfy a state regulation requiring that "[a]pplicants must adhere to the restrictions of all state and federal nondiscrimination laws. Specifically, the applicant must not discriminate on the basis of race, religion, color, national origin or disability. Such discrimination disqualifies the applicant from participation in the program." 208 F.3d at 708 (citation omitted). The Eighth Circuit found that this law's "direct application to the Klan in this case would violate the Klan's freedom of political association." *Cuffley*, 208 F.3d at 708.

The court concluded that "viewpoint-based exclusion of any individual or organization from a government program is not a constitutionally permitted means of expressing disapproval of ideas—even very poor ideas—that the government disfavors." *Id.* at 712.

The Eighth Circuit followed up in *Robb*, holding that requiring the Klan to refrain from racial discrimination constituted an "unconstitutional condition on the Klan's participation in the Adopt-A-Highway program." *Robb*, 370 F.3d at 739 (citation omitted). The Eighth Circuit found that such a regulation is likely to be applied selectively by the state and that no organization other than the Klan ever had its application denied based on this regulation. *Robb*, 370 F.3d at 743-44. (Berkeley similarly has enforced its policy only against the Sea Scouts. App. D-21; D-45.) The Eighth Circuit concluded that "the State may not deny [the Klan's] AAH application because it discriminates on the basis of race." *Robb*, 370 F.3d at 745.

If the State of Missouri could not exclude a group from generally available benefits because of its constitutionally suspect policies of discrimination based on race, surely the City of Berkeley may not exclude a group because of its association with the BSA and BSA's constitutionally protected membership policies. *Dale*, 530 U.S. 640. The decision below, as well as that of the Second Circuit in *Wyman*, is thus in direct conflict with that of the Eighth Circuit in *Robb* and *Cuffley*.

Similarly, the Fifth Circuit in *Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd.*, 578 F.2d 1122, 1123 (5th Cir. 1978), overturned a school board's policy that denied the Klan the use of a high school gym for a Saturday night "patriotic meeting." The court framed the issue as to whether, consistent with the Constitution, a state agency could condition the use of public school facilities on the political or ideological view of the applicant or on its membership policies. *Id.*

at 1124. The court held that the public interest required "that unfashionable, even pernicious and mischievous, ideas should be admitted to the marketplace . . . . 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.' " *Id.* at 1127 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. at 642.

The Fifth Circuit criticized the school board for "franking those whose ideas and policies it finds suitable for public expression and gagging those it does not and this in the name of equal protection and civil rights." *Knights*, 578 F.2d at 1128. The decision below and that of the Second Circuit in *Wyman* are thus in direct conflict with the Fifth Circuit decision in *Knights*.

In *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997), the plaintiff organization of college students alleged that a state statute that prohibited any state college or university from spending public funds to sanction, recognize, or support any group that promotes lifestyle or action prohibited by sodomy and sexual misconduct laws violated the First Amendment. The organization had been denied funding by the school officials based on that statute. *Id.* at 1545-46.

The Eleventh Circuit found this Court's decision in *Rosenberger* dispositive, quoting Justice Kennedy's majority opinion, 515 U.S. at 829:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the

> restriction. These principles provide the framework forbidding the State [from] exercis[ing] viewpoint discrimination, even when the limited public forum is one of its own creation.

Pryor, 110 F.3d at 1549 (citations omitted).

The Eleventh Circuit's holding that viewpoint discrimination is impermissible in the provision of government benefits, *Pryor*, 110 F.3d at 1549, conflicts with the decision below that upholds Berkeley's exclusion of the Sea Scouts, including Petitioner, based on the politically disfavored viewpoint of the BSA.

B. The Decision Below Adds to the Conflict in the Circuit Courts as to Suppression of Speech and Association for Punitive Reasons

The court below disregarded Petitioner's allegations that members of the Berkeley City Council and other city officials expressed the intent to punish the Sea Scouts for BSA's policies. App. A-23-A-25. Specifically, two City Council members made clear that they intended to take punitive actions against the Sea Scouts in an attempt to overturn BSA's national policies. *Id.* at App. A-24-A-25 n.10. Further, Berkeley city officials

> indicated the city should and would deny the Sea Scouts continued benefits in order to discourage BSA from maintaining its disfavored policies and to retaliate for BSA's expulsion of Timothy Curran (the plaintiff in *Curran v. Mount Diablo Council of the Boy Scouts*, . . . , 17 Cal. 4th 670 [1998]) pursuant to those policies.

App. A-24-A25 n.10.[1]

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[1] This Court held in *Church of the Lukumi Babalu Aye, Inc. v. City* (continued...)

The Eighth Circuit found in *Robb* that the regulation in issue was promulgated in response to the holding in *Cuffley* that exclusion of a Klan group pursuant to a prior regulation was unconstitutional and the fact that the Klan was the only group that it has ever been used to exclude, strongly suggested that it had been used as a pretext to target the Klan group in a viewpoint-discriminatory manner. *Robb*, 370 F.3d. at 744. *Robb* further held that the state "failed to make any legitimate showing that [the Klan] violates its requirements, and this leads us to find that the State is using the regulation as a smokescreen to justify excluding [the Klan] because of its controversial political views." 370 F.3d at 740. As that court noted, "Because the State's proffered reason for excluding [the Klan] lacks any sort of plausible evidentiary support, we think it manifest that the exclusion was motivated by the State's discriminatory animus against [the Klan's] views." *Id.* at 741.

Similarly here, the lower court found that "the Sea Scouts have never actually discriminated against anyone on the basis of sexual orientation or religion." App. A-2. Under *Robb*, this strongly suggests that the Berkeley policy "has been used as a pretext to target the [Sea Scouts] in a viewpoint-discriminatory manner." 370 F.3d at 744. As in *Robb*, this makes "manifest that the exclusion was motivated by [Berkeley's] discriminatory animus against [BSA's] views." *Id.* at 741. The California court's disregard of Berkeley's motivating animus conflicts directly with the Eighth Circuit's holding in *Robb*.

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[1] (...continued)
of Hialeah, 508 U.S. at 540, contemporaneous statements made by city officials are relevant in determining the true object of the city council's ordinances.

C. In Approving the Singling Out of the Sea Scouts for Exclusion Based on Viewpoint, the Decision Below Adds to the Conflict in the Circuit Courts

The court below held that the fact "[t]hat other groups, which were not part of BSA, were not required to give local policy statements assuring nondiscrimination does not show unequal treatment." App. A-20. And indeed, other groups such as the Cal Sailing Club, the Nautilus Institute, and the Berkeley Yacht Club were permitted free berths without making the same promises that were demanded of the Sea Scouts. App D-21. Thus, Berkeley applied its policy of specific nondiscrimination assurances only to the Sea Scouts and only because they exercised their First Amendment right to freedom of expressive association in a manner Berkeley disagrees with.

The Second Circuit in *Wyman* similarly disregarded BSA's argument that the state neither investigated nor excluded other organizations that served persons of a particular sex, age, ethnicity, race, or sexual orientation. 335 F.3d at 95-96. Other federal circuits have found that the singling out of a group for disfavored treatment based on the exercise of constitutional rights is a clear violation of law. In *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 334 F.3d 796, 802 (9th Cir. 2003), the Ninth Circuit reversed the dismissal of a claim alleging an equal protection violation based on a county's singling out the plaintiff for unfavorable conditions and fees in retaliation for his exercise of First Amendment rights; and *Massie v. Inland Boatmen's Union of the Pacific*, 886 F.2d 1188, 1190-91 (9th Cir. 1989), reversed dismissal of a claim for selective enforcement based on the plaintiff's exercise of constitutional rights.

In *Cuffley*, the Eighth Circuit found that the fact that the government did not ask any organization other than the Klan about their membership criteria, nor investigate their

membership criteria, indicated that the denial of Klan participation was pretextual. 208 F.3d at 711. The Eighth Circuit therefore found that the denial of the Klan's application was based on the Klan's beliefs and advocacy and that "[s]uch interference with constitutional rights was impermissible." *Id.* (citation omitted).

Because the decision below adds to the conflict between the Second Circuit and the Fifth, Eighth, Ninth, and Eleventh Circuits, review should be granted, pursuant to Rule 10(b) of this Court.

III

THIS CASE INVOLVES IMPORTANT ISSUES OF LAW REGARDING THE CONSTITUTIONALITY OF WITHHOLDING GENERALLY AVAILABLE BENEFITS FROM POLITICALLY DISFAVORED ORGANIZATIONS

The decision below, in upholding Berkeley's punishment of the Sea Scouts based solely on their First Amendment right of association, sets an ominous precedent for other organizations affiliated with BSA and any other group whose views government disfavors. The California Supreme Court decision imperils the rights of thousands of California-based Boy Scouts, Cub Scouts, Sea Scouts, their parents, and volunteering adults; it declares them to be second class citizens for purposes of obtaining generally available government benefits, solely because of their desire to associate with BSA.

Indeed, the ruling below gives local governments an ominous power to chill the First Amendment rights of any disfavored group by imposing punitive and unequal treatment on organizations whose views or affiliations are considered "politically incorrect." This precedent would permit members of churches, mosques, or synagogues to be charged more for

use of a city swimming pool if their church policy required a belief in God or disfavored homosexuality. Indeed, under the lower court's rationale that local nondiscrimination policies outweigh First Amendment rights, California government entities can ban altogether the use of government properties by organizations such as religious groups that have restrictive membership policies.

The California Supreme Court has followed a current trend in judicial authorization of government penalties against disfavored organizations. In *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006), the district court ruled that the University of California's Hastings School of Law may deny funding as well as official recognition to a Christian student club that requires its members to sign a statement of faith and not engage in homosexual conduct. Another district court has ruled that the City of San Diego's lease of park property to the Boy Scouts violates the federal Establishment Clause because the Scout's core principles include belief in God. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1273, 1276 (S.D. Cal. 2003). The decision has been appealed to the Ninth Circuit.

The Oregon Court of Appeals interpreted a state anti-discrimination law to bar the Boy Scouts (but not other community organizations with different beliefs) from making informational presentations on public school grounds during the school day. *Powell v. Bunn*, 108 P.3d 37 (Or. Ct. App. 2005), *review granted* by Oregon Supreme Court.

Because the issue of government withholding of benefits from disfavored organizations is an important, continuing, and increasing one, review of the decision below should be granted pursuant to Rule 10(c) of this Court.

CONCLUSION

The conflict presented by the decision of the California Supreme Court is unmistakable. The California court has ignored or rejected the decisions of this Court and added to the conflict in the United States Circuit Courts of Appeals as to the constitutionality of withholding of government benefits from disfavored organizations. Petitioner respectfully urges this Court to grant this petition for writ of certiorari.

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Respectfully submitted,

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Filed 03/09/06

IN THE SUPREME COURT OF CALIFORNIA

EUGENE EVANS et al.,	)	
	)	
Plaintiffs and Appellants,	)	
	)	S112621
v.	)	
	)	Ct. App. 1/5 A097187
CITY OF BERKELEY et al.,	)	
	)	Alameda County
Defendants and Respondents.	)	Super. Ct. No. 809180-4
	)	

A city requested that a volunteer youth group affiliated with the Boy Scouts of America, in order to qualify for continued free use of berths in the city's marina, provide written assurance the group would not discriminate against homosexuals or atheists wishing to participate in the group's program. The city, deeming the policy statement the group provided ambiguous and therefore insufficient, discontinued its subsidy. Members of the group sued, claiming, among other things, that the city's action violated their freedoms of speech and association. The trial court sustained the city's demurrer, and the Court of Appeal affirmed. We conclude the Court of Appeal correctly determined that the complaint does not establish a violation of plaintiffs' constitutional rights and affirm the lower court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Because this case comes to us on a demurrer for failure to state a cause of action, we accept as true the well-pleaded allegations in plaintiffs' first amended complaint. "'We treat the demurrer as admitting all material facts properly pleaded,

but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' (*Serano v. Priest* (1971) 5 Cal. 3d 584, 591 [96 Cal. Rptr. 601, 487 P.2d 1241, 41 A.L.R. 3d 1187].) Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal. 2d 34, 42 [172 P.2d 867].)" (*Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318.) "'[A] complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective.' [Citation.]" (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal. App. 3d 369, 374; *see* Code Civ. Proc., § 430.30, subd. (a).) The following facts appear from the allegations of the complaint and from judicially noticeable sources.

Plaintiffs are 14 individual adult and youth participants in the Berkeley Sea Scouts, suing for themselves and other program participants. The Berkeley Sea Scouts (Sea Scouts) are volunteers joining together in a nonprofit association with no formal administrative structure, no budget, and no employees. Adults, including some of the named plaintiffs, use Sea Scout vessels to teach sailing, seamanship, marine engine repair, electrical repair, woodworking, and other skills for a maritime career, as well as teamwork, to teenagers who pay no more than $7 a year to participate. Ethnic diversity is a hallmark of the Sea Scouts, and many youth participants are economically disadvantaged. Girls as well as boys participate, and the Sea Scouts have never actually discriminated against anyone on the basis of sexual orientation or religion.

According to the operative complaint, the Sea Scouts are "a subdivision of," or "associated/affiliated with," the national Boy Scouts of America (BSA). The Sea Scouts operate under what the complaint describes as BSA's "regional office," the Mount Diablo Council. Each Sea Scout "ship" functions as the equivalent of a Boy Scout troop. BSA provides the group with

a low-cost maritime liability insurance policy but gives it no direct funding. BSA, according to the complaint, follows a "policy of discriminating against homosexuals' and atheists' participation."[1]

In the late 1930's, Berkeley began giving BSA one or more free berths at its marina for use by the Sea Scouts, after the Mount Diablo Council permitted Berkeley to quarry rock from BSA property to build the marina and breakwater. The arrangement was formalized by city resolutions in 1945 and 1969 that required compliance with marina rules and regulations and allowed revocation on 30 days' written notice.

In March 1997, in response to requests from other nonprofit organizations for free berths, the city manager recommended and the Berkeley City Council adopted through resolution No. 58,859-N.S. (Resolution 58,859) a uniform policy for awarding free berths to nonprofit community service organizations.[2] Under the resolution, an organization seeking

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[1] The complaint cites *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal. 4th 670, and *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, both of which describe BSA's doctrinal opposition to participation in scouting programs by atheists and known homosexuals.

[2] Resolution 58,859 is a "legislative enactment[] issued by or under the authority of . . . [a] public entity in the United States," of which notice may be taken under Evidence Code section 452, subdivision (b). (See *Cooke v. Superior Court* (1989) 213 Cal. App. 3d 401,416 [county resolution increasing level of dental care for indigents], disapproved on another point in County of *San Diego v. State of California* (1997) 15 Cal. 4th 68, 106, fn. 30.) The operative complaint also alleges the existence and some of the terms of the resolution. We also take notice, as legislative history reflecting on the purposes of the enactment, of the city manager's memorandum

(continued...)

free berth space must "supply a beneficial public service," the benefit of which "greatly exceeds the value of the berth." The organization also must "demonstrate," through "[m]embership policy and practices," among other criteria, that it "promote[s] cultural and ethnic diversity." Resolution 58,859 goes on to specify that access to marina facilities may "not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition." The resolution provides for the Berkeley Waterfront Commission (Waterfront Commission) to review applications and make recommendations to the city council. Organizations receiving berthing subsidies are to have those subsidies reviewed annually by the city council after a review and recommendation by the Waterfront Commission.

The continued provision of free marina berths to the Sea Scouts came up for review in the Waterfront Commission in early 1998. The commission expressed concern that BSA's policy of discrimination against homosexuals and atheists was in conflict with Resolution 58,859 and asked the Sea Scouts to provide a "local policy statement" ensuring nondiscrimination. The Sea Scouts, in negotiation with the Mount Diablo Council, approved a policy statement intended to satisfy Berkeley's requirements. In a letter to the waterfront manager, dated April 8, 1998, the Sea Scouts stated: "We will continue to comply with the Constitution of the United States of America, the laws of the State of California and the Berkeley Municipal Code—including Section 13.28.060 and City Council Resolution No. 58,85[9], N.S. [¶] . . . We actively recruit adult leaders and adolescents meeting the minimum age requirements

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[2] (...continued)
to the mayor and city council recommending the resolution's adoption. (See *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal. 4th 824, 848, fn. 6; *Elsner v. Uveges* (2004) 34 Cal. 4th 915, 929 & fn. 10.)

without regard to sex, race, color, national origin, political affiliation, religious preference, marital status, physical handicap or medical condition. We believe that sexual orientation is a private matter, and we do not ask either adults or youths to divulge this information at any time."[3]

The Waterfront Commission recommended the city council continue the Sea Scouts' free berths. The city manager, however, recommended the council discontinue the free berths, based on an opinion by the city attorney concluding that continuation of the free berth subsidy to the Sea Scouts would violate both Resolution 58,859 and section 13.28.060 of the Berkeley Municipal Code, which prohibits discrimination based on sexual orientation in the use of city owned or supported facilities and services.[4]

In her opinion, which was provided to the council with the city manager's recommendation, the city attorney concluded the Sea Scouts' April 8, 1998, letter did not constitute compliance with Resolution 58,859 or Berkeley Municipal Code section 13.28.060. In the city attorney's view, the Sea Scouts' assertion in the April 8 letter that they considered sexual orientation to be "a private matter" did not state a policy that the group would

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[3] The text of the Sea Scouts' April 8, 1998, letter appears in the appellate record only in plaintiffs' original complaint, which was superseded by amendment after the trial court granted judgment on the pleadings for Berkeley with leave to amend. Both parties, however, quote the letter's language in their briefing. The superseded allegation, it thus appears, was not made by mistake or inadvertence, and no potential dispute exists as to the letter's language, allowing its consideration on demurrer. (See *Reichert v. General Ins. Co.* (1968) 68 Cal. 2d 822, 836; *Joslin v. H.A.S. Ins. Brokerage*, *supra*, 184 Cal. App. 3d at p. 375.)

[4] Regarding judicial notice of the city attorney's opinion, see footnote 5, post.

not, in the future, discriminate on the basis of sexual orientation. According to the city attorney, the Sea Scouts said they were unwilling to state such an express policy "due to fear of losing their charter from the Boy Scouts." From her examination of this court's then recent opinion in *Curran v. Mount Diablo Council of the Boy Scouts*, *supra*, 17 Cal. 4th 670, and her discussion with BSA's attorney in that case, the city attorney concluded that BSA requires local groups to adhere to its policy of excluding avowedly gay or atheistic members or adult leaders, even where a local nondiscrimination law requires otherwise. In light of BSA's policy, the city attorney concluded, the qualified language of the April 8 letter was insufficient to show compliance with Berkeley's ordinance and resolution.

The Berkeley City Council took up the matter on May 5, 1998. According to plaintiffs' complaint, at the May 5 meeting the city council was "made aware" that the Sea Scouts had never discriminated against gays or atheists and that the Sea Scout program served an ethnically and economically diverse group of young people. The city council nevertheless voted to end the berth subsidy.

According to the minutes of the May 5 council meeting, the free berths were discontinued "due to [BSA's] discriminatory policies against gays and atheists."[5] In a letter

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[5] Berkeley asserts the minutes are noticeable as a legislative enactment (Evid. Code, § 452, subd. (b)) and the city attorney's opinion is noticeable as legislative history reflecting on the basis for that enactment. Plaintiffs do not dispute the former point and quote the minutes' statement of the reason for denial at least twice in their brief, which we take as a concession the minutes may be considered on review of the demurrer. In their reply brief, plaintiffs object to the city attorney's opinion on the ground it contains hearsay regarding BSA's policies, but that objection does not reach the facts

(continued...)

giving the Sea Scouts notice their free berths were cancelled, the Berkeley Waterfront Manager indicated the city council had denied free berths to the Sea Scouts because, in the complaint's words, the Sea Scouts "were associated with the national Boy Scouts of America organization which has a national policy of discriminating based on sexual orientation and atheism."

Because of its hostility to BSA, plaintiffs allege, Berkeley "decided to punish and intentionally discriminated against the completely innocent children and community volunteer[s]" of the Sea Scouts. Berkeley allegedly knew plaintiffs had, in the April 8, 1998, letter, "agreed not to discriminate against gays or atheists." The city used "[g]uilt by association," excluding plaintiffs from the free berth program solely because of BSA's policies, without ever determining that the Sea Scouts themselves "pose[d] the threat feared by the government"—discrimination in the use of publicly owned facilities. "Here, there is no evidence that Plaintiffs or any participant in the Berkeley Sea Scouts program was going to unlawfully discriminate against anyone, yet they have been penalized by the deprivation of the continued free use of the public facilities."

Plaintiffs allege the exclusion of the Sea Scouts from the free berth program violated their rights of free speech and association and constituted a denial of due process and equal protection of the laws. These deprivations of constitutional rights are claimed to be violations of state and federal civil rights laws, including Civil Code sections 51, 52, and 52.1, and

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[5] (...continued)
for which notice is sought: that the city attorney concluded continuing free berths would violate the city's resolution and ordinance and conveyed that opinion to the city manager and council. In the absence of a sound objection, we take notice of the opinion as well as the minutes.

title 42 United States Code section 1983. Plaintiffs seek damages reflecting the value of berths they were unable to afford to continue using, the rental they have paid and will pay for the berth they still use, emotional distress, and consequential losses. The complaint does not pray for injunctive or declaratory relief.

The trial court sustained Berkeley's demurrer to the amended complaint without leave to amend. The Court of Appeal affirmed, reasoning that plaintiffs had merely been denied a city subsidy "because they declined to adhere to Berkeley's nondiscrimination policy." Berkeley had not "attempted to muzzle anyone's speech" or force the Sea Scouts to sever their association with BSA, but had only "conditioned a city subsidy on compliance with nondiscrimination principles."

We granted plaintiffs' petition for review.

DISCUSSION

Plaintiffs contend Berkeley violated their rights of free association, speech, and equal treatment under the law by punishing them for being part of BSA despite their having never violated Berkeley's antidiscrimination laws and having "solemnly promised" not to do so in the future. The Court of Appeal, plaintiffs argue, erred in holding Berkeley had properly conditioned the subsidy on compliance with nondiscrimination laws because plaintiffs "have *agreed to comply.*" The lower court and Berkeley, plaintiffs maintain, "*are refusing to take . . . yes for an answer.*"

Berkeley, in contrast, argues that it may place nondiscrimination conditions on government funding without violating rights of speech and association, and insists it properly denied continued free berthing solely because the Sea Scouts

were unable to provide adequate assurances of future nondiscrimination, assurances Berkeley reasonably demanded in light of the known policies of BSA, of which the Sea Scouts are a part.

We agree with Berkeley and the Court of Appeal that a government entity may constitutionally require a recipient of funding or subsidy to provide written, unambiguous assurances of compliance with a generally applicable nondiscrimination policy. We further agree Berkeley reasonably concluded the Sea Scouts did not and could not provide satisfactory assurances because of their required adherence to BSA's discriminatory policies.

I. Berkeley Could Constitutionally Demand Sufficient Guarantees of Nondiscrimination

Berkeley's requirement that an individual or group receiving a city subsidy in the form of free berths in the Berkeley Marina agree in advance to administer its program without invidious discrimination did not infringe on plaintiffs' speech or associational rights. In order to meet the city's mandate of nondiscriminatory participation policies, the Sea Scouts were required neither to espouse nor to denounce any particular viewpoint nor to form or break any association or affiliation, but only to assure Berkeley of their adherence to the city's policies in connection with subsidized use of Berkeley's facilities.

Under the decisions of the United States Supreme Court, that Berkeley's nondiscrimination requirement applied only to programs assisted by a city subsidy, in the form of free berths at the marina, is virtually dispositive. The high court has generally approved, against First Amendment challenges, programs of governmental financial assistance that limit the expressive activities for which the funds may be used.

In the leading case of *Rust v. Sullivan* (1991) 500 U.S. 173, the court rejected a First Amendment challenge to regulations prohibiting abortion counseling in programs supported by federal family planning funds. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. '[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.' [Citations.]" (*Id.* at p. 193.)

In restricting the range of counseling and advocacy in which programs receiving federal funding could engage, the government had not denied the grantees the right to engage in abortion-related activities. "Congress has merely refused to fund such activities out of the public fisc. . . ." (*Rust v. Sullivan*, *supra*, 500 U.S. at p. 198; accord, *United States v. American Library Assn., Inc.* (2003) 539 U.S. 194, 212 (plur. opn.) [statutory requirement that libraries receiving aid for Internet access use filtering software "does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. [The statute] simply reflects Congress' decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance"]; *Regan v. Taxation With Representation of Wash.* (1983) 461 U.S. 540, 549 [denial of full tax-exempt status to an organization that engages in substantial lobbying activities does not infringe on freedom of speech: "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny"]; cf. *Locke v. Davey* (2004) 540 U.S. 712, 721 [scholarship program's exclusion of theology students does not violate First

Amendment's free exercise clause; provision of assistance to those pursuing secular education does not constitute a "'baseline'" against which denial of assistance to theology students must be deemed a burden on religion].)

The Supreme Court has applied these principles, in particular, to uphold, against First Amendment challenges, government rules limiting financial assistance to those organizations that agree in advance not to practice invidious discrimination in government-assisted programs. *Grove City College v. Bell* (1984) 465 U.S. 555 (*Grove City*) is the closest case on point. A federal statute required recipients of federal education funds to agree not to discriminate on the basis of sex in any program so funded. When the plaintiff college declined to provide an "Assurance of Compliance" with the statute, the federal Department of Education terminated a program of tuition assistance to the college and its students. (*Id.* at pp. 557-561.)

The *Grove City* plaintiffs attacked the statutory condition as, inter alia, a violation of their First Amendment rights, but the high court found the constitutional claim "warrants only brief consideration. Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. *E.g., Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Grove City may terminate its participation in the [tuition aid] program and thus avoid the requirements of [the nondiscrimination provision]. Students affected by the Department's action may either take their [tuition aid] elsewhere or attend Grove City without federal financial assistance. *Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the [tuition aid] program infringes no First Amendment rights of the College or its students.*" (*Grove City*, *supra*, 465 U.S. at pp. 575-576, italics added; see

also *Bob Jones University v. United States* (1983) 461 U.S. 574, 602-604 (*Bob Jones*) [restrictive condition on charitable tax status, requiring lack of racial discrimination, did not infringe university's First Amendment right to freedom of religion because the compelling interest in preventing racial discrimination in education justified the policy's limited impact on exercise of religion: "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets"].)[6]

Similarly, Berkeley, in conditioning free berths on a group's adoption of a nondiscriminatory membership policy, has not prohibited or penalized plaintiffs' exercise of speech or associational rights. In adopting Resolution 58,859 and applying it to end free berths for the Sea Scouts, the city did not purport to prohibit the scouts from operating in a discriminatory manner; it simply "refused to fund such activities out of the public fisc. . . ." (*Rust v. Sullivan*, *supra*, 500 U.S. at p. 198.) To the extent the Sea Scouts objected to compliance with Resolution 58,859, the organization (to paraphrase *Grove City, supra*, 465 U.S. at p. 575) was free to terminate its participation in the free berth program and thus avoid the requirements of the nondiscrimination provision; "a legislature's decision not to

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[6] Plaintiffs argue *Grove City* and *Bob Jones* govern only where eliminating a particular type of discrimination has been recognized as a "compelling national interest." The high court in *Grove City*, however, relied on no such compelling-interest analysis, holding simply that the government could attach "reasonable and unambiguous conditions" to financial assistance it offered private institutions. (*Grove City, supra*, 465 U.S. at p. 575.) The court did, in *Bob Jones, supra*, 461 U.S. at page 603, apply the compelling-interest test for free exercise claims, but it later held, in *Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 885, that such a justification was not required for neutral laws of general applicability.

subsidize the exercise of a fundamental right does not infringe the right" (*Regan v. Taxation With Representation of Wash., supra*, 461 U.S. at p. 549).

The Supreme Court has recognized two exceptions to its broad rule that the government's refusal to subsidize exercise of a First Amendment right does not infringe that right. Neither is applicable here.

First, a funding restriction that has as its purpose the suppression of a disfavored viewpoint—especially, but not only, where the government program at issue exists to create or foster a public forum—is subject to strict scrutiny. Invalidating a rule precluding federally funded legal services affiliates from challenging welfare laws, the Supreme Court explained: "Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." (*Legal Services Corp. v. Velazquez* (2001) 531 U.S. 533, 548-549; see also *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) 515 U.S. 819, 832-834 [exclusion of journals promoting a particular set of religious viewpoints from program of financial assistance to student newspapers infringed student group's freedom of speech]; *Regan v. Taxation With Representation of Wash., supra*, 461 U.S. at p. 548 [refusal to subsidize lobbying would not come within the rule of permissibility "if Congress were to discriminate invidiously in its subsidies in such a way as to '"aim[] at the suppression of dangerous ideas"'"]; *Perry v. Sindermann* (1972) 408 U.S. 593, 595, 598 [college teacher's allegation that the administration's decision not to rehire him was based on his public criticism of its policies presented "a bona fide constitutional claim"]; *Speiser v. Randall* (1958) 357 U.S. 513, 518 ["denial of a tax exemption for engaging in

certain speech" infringes freedom of speech because it is '"frankly aimed at the suppression of dangerous ideas'"].)[7]

The exception for attempted suppression of a disfavored viewpoint is inapposite to the condition imposed here. In terminating the Sea Scouts' free berths because of the group's failure fully and unambiguously to promise future nondiscrimination, Berkeley did not demand adherence to or renunciation of any idea or viewpoint. A government that requires aid recipients to conform their actions to its laws does not thereby enforce adherence to the philosophy or values behind those laws. More specifically, to state, in applying for government funding, that one will not use the funding for a discriminatory program is not necessarily to state that one agrees with the government's nondiscrimination objective. Thus Berkeley, in requiring assurances that its subsidy and property will be used without discrimination on the basis of religion or sexual orientation, does not demand adherence to the *viewpoint* that motivated the nondiscrimination provision. (See *Boy Scouts of America v. Wyman* (2d Cir. 2003) 335 F.3d 80, 94 [exclusion of BSA from state's workplace charitable contribution campaign because of its discriminatory policies was viewpoint neutral in that nondiscrimination rule's purpose was "to protect persons from the . . . economic and social harms of discrimination" rather than "to impose a price on the expression of [BSA's] point of view"]; but see *Boy Scouts of America, South Florida v. Till* (S.D.Fla. 2001) 136 F.Supp.2d 1295, 1308 [exclusion of local council from off-hours use of

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[7] The restriction on speech of family planning grant recipients in *Rust v. Sullivan*, *supra*, 500 U.S. 173, might appear to fall logically within this exception, but the high court has since characterized the program in *Rust* as involving government promulgation of its own message, an enterprise in which the government enjoys even greater leeway than in the funding of private speech. (*Legal Services Corp. v. Velazquez*, *supra*, 531 U.S. at p. 541.)

public schools because of its adherence to BSA's discriminatory policy characterized as punishment of council for its "message"].)

Second, a restriction is suspect to the extent it goes beyond limiting the government funded expressive activity of the recipient and attempts further to limit expressive activities that are *not* government funded. In *Rust v. Sullivan*, *supra*, 500 U.S. at pages 196-197, the high court explained that funding restrictions previously held to constitute unconstitutional conditions had involved "a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program," but that a recipient of family planning funds could, despite the restrictions at issue, "continue to . . . engage in abortion advocacy . . . through programs that are separate and independent from" the federally assisted project. (See also *FCC v. League of Women Voters of California* (1984) 468 U.S. 364, 400 [invalidating rule precluding public broadcasting stations from editorializing, in part because under the rule a station that received only a small amount of its income from federal grants was "barred absolutely from all editorializing . . . . The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity']; Sullivan, *Unconstitutional Conditions* (1989) 102 Harv. L. Rev. 1413, 1463-1467 [discussing "germaneness" as a limitation on government funding conditions].)

This exception, too, is inapplicable. Berkeley, in conditioning its free berths on the Sea Scouts' agreement not to engage in invidious discrimination, did not purport to control the exercise of speech or associational rights by the Sea Scouts or individual plaintiffs *outside* the Berkeley Marina program.

Even were the nondiscrimination assurance demanded by Berkeley regarded as a conditional burden on speech or association, its scope would be limited to the very program subsidized by the city. As in *Rust v. Sullivan*, *supra*, 500 U.S. 173, and *Regan v. Taxation With Representation of Wash.*, *supra*, 461 U.S. 540, plaintiffs here would be free to exercise their expressive or associational rights fully in any program not funded by public money. Federal high court precedent thus fails to support plaintiffs' constitutional claims.

Plaintiffs also contend that by conditioning free berths on adequate assurance of nondiscrimination, Berkeley has established an unconstitutional condition under the decisions of this court. We disagree.

In *Danskin v. San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536, this court held invalid on First Amendment grounds a statutory and regulatory scheme that permitted the use of school facilities for the meetings of private groups but excluded "subversive elements." We explained that while "[t]he state is under no duty to make school buildings available for public meetings" (*id.* at p. 545), having done so it could not constitutionally "demand tickets of admission in the form of convictions and affiliations that it deems acceptable" (*id.* at p. 547). We reiterated this principle in *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal. 2d 499, 504, explaining that "the power of government, federal or state, to withhold benefits from its citizens does not encompass a supposed 'lesser' power to grant such benefits upon an arbitrary deprivation of constitutional right." At the same time, we emphasized that some such conditions on public benefits were justifiable; we articulated a test of justification focusing on how germane and well-tailored the condition is to the purpose of the legislation establishing the benefit and whether the utility of imposing the condition outweighs the impairment of constitutional rights. (*Id.* at pp. 505-507; see also *Committee to*

Defend Reproductive Rights v. Myers (1981) 29 Ca1. 3d 252, 265-266.)

To apply these principles governing conditions on public benefits here, we need not decide whether Berkeley had adequate justification for its condition, as the condition—the giving of adequate assurances of nondiscrimination—did not demand or preclude the exercise of any speech or associational right by plaintiffs. Plaintiffs repeatedly disavow, both in their complaint and in their briefs in this court, any desire to discriminate on the basis of sexual orientation or religion. They therefore cannot, and do not, claim that Berkeley, by requiring them to refrain from such discrimination as a condition of the free berths, is restricting their freedom to limit their membership for purposes of expressive association. (Cf. *Boy Scouts of America v. Dale*, *supra*, 530 U.S. 640; *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) 515 U.S. 557.) Indeed, plaintiffs, in their briefing, explain why this is a misconstruction of their claims: "Berkeley suggests that Petitioners challenge the condition as 'forc[ing] inclusion' of homosexuals and atheists in their ranks. Obviously this is not so, because Petitioners do not discriminate."

Berkeley's requirement that the Sea Scouts document a nondiscriminatory membership policy in order to qualify for the free berth program also did not condition receipt of a public benefit on the Sea Scouts' giving up their right to be a part of BSA. In requiring assurances of nondiscrimination, Berkeley did not in any way demand, even as a condition of the free berths, that the Sea Scouts quit BSA. To the extent compliance with the city's requirement would have that effect, it would be by the choice of a third party, BSA. Were BSA, that is, to cut its ties with a local scouting program because the program made assurances of nondiscrimination to a local government, the decision to sever the association would be BSA's, not the

government's. We are aware of no authority for the extraordinary proposition that government infringes on associational rights by offering one group a financial benefit that, if accepted, could lead another group to sever its association with the recipient.[8]

Nor, as already discussed, did Berkeley's requirement that free berth recipients have nondiscriminatory membership policies require the Sea Scouts, as a condition of the subsidy, to adopt an antidiscrimination viewpoint or repudiate BSA's discriminatory philosophy (a philosophy the Sea Scouts, in any event, expressly state they do not share). We therefore do not agree with plaintiffs that by conditioning free berths on the Sea Scouts' statement of a local nondiscrimination policy, the city compelled them to "renounce" BSA's positions and to "advocate and disseminate" Berkeley's own philosophy. As already explained, to condition a public benefit on assurances of nondiscrimination is not to compel advocacy of a viewpoint.

The complaint alleges Berkeley attempted to compel the Sea Scouts to subscribe to a "pledge of fealty" or "loyalty oath" according with Berkeley's antidiscrimination values. On analysis, however, these general claims provide no valid grounds for a claim of unconstitutionality. The only *facts* alleged regarding such a coerced statement of viewpoint concern the Waterfront Commission's request for a local policy statement of nondiscrimination. The Sea Scouts, according to the complaint, provided such a statement in their letter of April 8, 1998. This satisfied the Waterfront Commission, which recommended continuation of the free berths, albeit on conditions that the letter be distributed to program participants and that the Sea Scouts initiate a dialogue with the Mount

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[8] In part II of the discussion, *post*, we reject plaintiffs' additional argument that Berkeley has infringed their associational rights by *punishing* them for being affiliated with BSA.

Diablo Council on obtaining a change in the national BSA policy. Had the Berkeley City Council accepted the Waterfront Commission's recommendation and imposed these conditions on continuation of the free berths, plaintiffs might with greater plausibility contend the conditions infringed their freedom of speech. But the city council *rejected* the Waterfront Commission's recommendation, instead accepting the city manager's and city attorney's recommendation that the subsidy be discontinued because the April 8 letter was an insufficient assurance of nondiscrimination. The city council's action mooted any claim that the conditions proposed by the Waterfront Commission were unconstitutional.

II. Plaintiffs Have Not Been Punished for Associating with BSA

Relying on *Healy v. James* (1972) 408 U.S. 169, plaintiffs contend they have been subjected to a judgment of "'guilt by association'" in that Berkeley had no reason to believe the Sea Scouts themselves "'pose[d] the threat [of discrimination] feared by the Government,'" but rather assumed they discriminated simply because of their affiliation with BSA. (*Id.* at p. 186.) Berkeley's denial of free berths was arbitrary and unjustified by its nondiscrimination purpose because, plaintiffs contend, it "punishes innocent children, and their adult leaders, who are not engaged in the discrimination that Berkeley claims to be battling." In a related claim, they argue they were denied equal protection of the laws in that they were treated differently from other nonprofit community service organizations using the marina, solely because of their association with BSA. Again, we disagree.

The Sea Scouts are a part of BSA, an organization whose official policy excludes homosexuals and atheists from participation. That Berkeley officials were unaware of any past discrimination by the Sea Scouts does not mean none would

occur in the future. To require of a group operating as part of an organization with an official policy of discrimination that it agree in advance not to discriminate in the use of the city's free marina berths is a reasonable and narrowly tailored step to implement the diversity and nondiscrimination provisions of Resolution 58,859. That other groups, which were not part of BSA, were not required to give local policy statements assuring nondiscrimination does not show unequal treatment.

When the city asked the Sea Scouts to document that their local policy differed from BSA's, the Sea Scouts negotiated with BSA over such a policy, but, as their attorney explained to the trial court, "They couldn't say the words 'We do not discriminate on the basis of sexual discrimination [*sic*: orientation],' because the Boy Scouts objected." According to the attorney, BSA told plaintiffs, "You can't say you don't discriminate based on sexual orientation."

At oral argument in this court, plaintiffs, through their attorney, expanded on these concessions. When asked by the court what plaintiffs' course of action would be if an "openly and avowedly gay" person sought to participate in the Sea Scouts program, counsel responded, "If the Boy Scouts forbid it, it wouldn't happen. . . . [I]f the Boy Scouts came down on us, we would have to exclude that person." Asked whether plaintiffs and BSA were "one and the same" with regard to potential discrimination, counsel replied, "Essentially," and explained that while BSA and the Sea Scouts were "different organizations, . . . we are bound by what the Boy Scouts tell us we have to do." We accept these concessions by plaintiffs as establishing, even as against any contrary allegation or implication of the complaint, that the Sea Scouts could not, consistent with the limitations imposed on them by BSA, truthfully state they would not in the future discriminate against openly gay or atheistic participants. (See *DeRose v. Carswell* (1987) 196 Cal. App. 3d 1011, 1018-1019 [concessions of the

plaintiff's attorney before trial court negate contrary allegations for purposes of demurrer]; cf. *Browne v. Superior Court* (1940) 16 Cal.2d 593, 599 [the petitioner's concessions at oral argument negate contrary allegations in the habeas corpus petition]; *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal. App. 4th 1468, 1474, fn. 6 [admissions in the plaintiffs' appellate brief negate statements in declarations for summary judgment purposes].)[9]

Because of the restrictions enforced by BSA, the April 8, 1998, letter was ambiguous as to how the Sea Scouts would treat an avowedly gay or atheistic participant. The Sea Scouts' statement that they would obey city law implied they would not discriminate on the basis of sexual orientation or religion, as city law forbade such discrimination. But the

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[9] In light of plaintiffs' concessions that the Sea Scouts could not unequivocally state they would not discriminate against gay and atheistic participants and that they would have to follow BSA's discriminatory policy if the occasion arose, their reliance on *Robb v. Hungerbeeler* (8th Cir. 2004) 370 F.3d 735 is misplaced. In that case, the State of Missouri claimed it had properly excluded a local unit of the Knights of the Ku Klux Klan from the state's Adopt-A-Highway program because of the group's judicially noticed history of violence. (*Id.* at p. 740.) The court of appeals found the state's rationale for exclusion "rings hollow" (*ibid.*) because the judicially noticed history of violence related generally to organizations named Knights of the Ku Klux Klan rather than specifically to the local unit or its organizers (*id.* at p. 741). "The mere fact that an applicant's organizational name includes certain widely-used language that has been used in the past by groups for which judicial notice has been taken of having a history of violence is inadequate to demonstrate that the applicant itself violates the dictates of the regulation." (*Ibid.*) The Sea Scouts, who according to the complaint form a subdivision of BSA, whose statement of local policy was limited by BSA dictates, and who, plaintiffs concede, must follow BSA's discriminatory policy, obviously share more than a coincidence of nomenclature with the national organization.

subsequent statement that the Sea Scouts recruit without regard to a list of factors including race, sex, and "religious preference," but *not* including sexual orientation or religion as such, implied, to the contrary, that the group would disfavor potential participants who were known to be gay or who "prefer[red]" *no* religion. Finally, the Sea Scouts' statement that they viewed sexual orientation as a "private matter" they do not ask participants to "divulge" strongly implied that they viewed openly or avowedly gay people differently from those who kept their orientation private, and reserved the right to treat them differently, contrary to the nondiscrimination requirement of Resolution 58,859. In the April 8 letter, the Sea Scouts, in effect, reserved the right to discriminate against avowedly gay or atheistic participants.

Healy v. James, *supra*, 408 U.S. 169, upon which plaintiffs rely, actually supports Berkeley's decision. While the high court there condemned government actions "denying rights and privileges solely because of a citizen's association with an unpopular organization" (*id.* at p. 186), the court went on to explain that the government could legitimately demand assurances that an individual or group would not engage in the same prohibited activities as the larger organization with which the individual or group was associated (*id.* at pp. 191-194). Specifically, the high court held that a local Students for a Democratic Society chapter's "equivocation" regarding the use of violent and disruptive tactics could warrant denying the group official recognition. (*Id.* at p. 191.) Though there was no evidence the local group actually posed a significant threat of disruption to the college (*id.* at pp. 189-190), the court explained, "the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any campus rules with which it disagrees" (*id.* at pp. 193-194). The requirement that a student group seeking official recognition "affirm in advance its willingness to adhere to reasonable campus law . . . does not impose an

impermissible condition on the students' associational rights." (*Id.* at p. 193; see also *Grove City*, *supra*, 465 U.S. at p. 575 [requiring "Assurance of Compliance" from college was a "reasonable and unambiguous" condition of federal assistance].)

Similarly, Berkeley did not engage in overbroad or arbitrary regulation in denying a subsidy to a BSA program that refused to state an unambiguous local policy of nondiscrimination, instead pointedly reserving the right to discriminate against openly gay and atheistic participants. Denial of free berths to a program operating under a national organization with an enforced policy of discrimination, a program that was asked to and would not give an unqualified assurance of future nondiscrimination, was not overbroad or unjustified as a means of enforcing Berkeley's policy limiting free berths to nonprofit community service organizations that serve the public diversely and without invidious discrimination.

As explained earlier, a demurrer assumes the truth of the complaint's properly pleaded allegations, but not of mere contentions or assertions contradicted by judicially noticeable facts. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318; *Joslin v. H.A.S. Ins. Brokerage*, *supra*, 184 Cal.App.3d at p. 374.) Here, the noticeable and conceded facts contradict the complaint's assertions that Berkeley "decided to punish . . . [the] completely innocent" plaintiffs for their association with BSA despite knowing that plaintiffs had, in the April 8, 1998, letter, "agreed not to discriminate against gays or atheists." The facts, including those in the complaint, those subject to judicial notice, and those conceded by plaintiffs, show the Sea Scouts could not and did not unambiguously promise not to discriminate in the use of the marina facilities. The city council, in receipt of the city attorney's opinion discussing the April 8 letter's ambiguity and the city manager's consequent

denial recommendation, denied the continued subsidy because BSA's "discriminatory policies against gays and atheists" made impossible a full and unambiguous assurance the Sea Scouts would not discriminate in the future.

Similarly, plaintiffs' allegation that the city excluded plaintiffs from the free berth program without ever determining that the Sea Scouts themselves "pose[d] the threat" of discrimination and without "evidence that Plaintiffs or any participant in the Berkeley Sea Scouts program was going to unlawfully discriminate against anyone," is contradicted by their own concessions and the noticeable facts. The city asked for full assurances that the program posed no threat of future discrimination, but it did not receive them. In light of BSA's policies, which, as counsel conceded in this court, plaintiffs would have to follow, Berkeley reasonably concluded that the Sea Scouts' representations were inadequate to assure future compliance with the city's nondiscrimination rules. Plaintiffs' claim that Berkeley simply "refuses to take . . . yes for an answer" is belied by the record, which establishes that the Sea Scouts, because of BSA's enforced policies, could not and did not respond to the city with a simple "yes," but rather with an evasive "maybe."

Plaintiffs rely in part on allegations that individual members of the Berkeley City Council and other city officials expressed the intent to punish BSA or the Sea Scouts for BSA's policies.[10] Under some circumstances, where the decision

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[10] Councilmembers Woolley and Worthington allegedly "made clear," around the time of the March 11, 1998, Waterfront Commission meeting, that they intended to take "punitive actions" against the Sea Scouts in an "attempt to overturn [BSA's] national policies." At the May 5, 1998, city council meeting, unnamed Berkeley "officials" allegedly indicated the city should and would

(continued...)

maker's reason or object is itself a contested element of a claim of unconstitutionality, "statements made by members of the decisionmaking body" are properly considered, together with other types of evidence, in determining the object of the official action. (*Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 540; see also *Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 267-268.) But here there is no dispute the basis for the city council's action was, as the council minutes stated, BSA's "discriminatory policies against gays and atheists," which—as the record shows and plaintiffs' attorney conceded in this court—made it impossible for the Sea Scouts to give a complete and unambiguous guaranty against future discrimination. In light of that undisputed legislative object, allegations suggesting merely that individual council members voted for the action because of their personal hostility to BSA's views do not state a claim for a constitutional violation, for such individual motives do not alter the undisputed grounds upon which the council, as a body, acted. (See *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 572, fn. 5 ["'Material showing the motive or understanding of an individual legislator, including the bill's author, his or her staff, or other interested persons, is generally not considered. [Citations.] This is because such materials are generally not evidence of the Legislature's *collective* intent'"].)

CONCLUSION AND DISPOSITION

The properly pleaded factual allegations of the first amended complaint, taken as true and read in light of the

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[10] (...continued)
deny the Sea Scouts continued benefits in order to discourage BSA from maintaining its disfavored policies and to retaliate for BSA's expulsion of Timothy Curran (the plaintiff in *Curran v. Mount Diablo Council of the Boy Scouts*, *supra*, 17 Cal.4th 670) pursuant to those policies.

judicially noticeable facts and plaintiffs' factual concessions, show that Berkeley discontinued the Sea Scouts' berth subsidy because the program was unable, consistent with the enforced policies of BSA, to provide adequate assurances of future nondiscrimination. Denial of a continued subsidy on this ground did not infringe plaintiffs' associational, speech, or equal protection rights. We therefore affirm the judgment of the Court of Appeal.

WERDEGAR, J.

WE CONCUR:
GEORGE, C.J.
KENNARD, J.
BAXTER, J.
CHIN, J.
MORENO, J.
CORRIGAN, J.

Filed 11/25/02

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

EUGENE EVANS et al., Plaintiffs and Appellants, v. CITY OF BERKELEY et al., Defendants and Respondents.	A097187 (Alameda County Super. Ct. No. 809180-4)

Appellants challenge a judgment dismissing their action against respondent City of Berkeley. Appellants contend the trial court erroneously sustained a demurrer to their amended complaint, which challenged respondent's termination of a program under which appellants were allowed to berth their boats, rent free, at the Berkeley Marina. Appellants maintain the decision to end this subsidy of free rent for their boat berths violated their contractual rights, First Amendment rights, civil rights, and equal protection rights. We affirm the trial court's judgment.

Appendix B–2

I. FACTS AND PROCEDURAL HISTORY

Appellants identify themselves as members or affiliates of an unincorporated association of Sea Scouts, a group which is affiliated with the Boy Scouts of America. For many decades appellants had moored their boats, rent free, at the Berkeley Marina, which is owned by respondent City of Berkeley (Berkeley).

In 1997, Berkeley enacted a city policy, as stated in Berkeley City resolution No. 58,859-N.S., which forbids the use of city funds to subsidize the activities of private groups using city property at the marina, if those groups discriminate against individuals on grounds of race, sex, national origin, religion or lack thereof, sexual orientation, and other grounds.[1] In May of 1998, Berkeley informed appellants they could no longer berth their boats for free at the marina, unless they expressly abandoned any policy of discriminating against gays or atheists. Appellants declined to specifically comply with this requirement,[2] and their free rent subsidy was ended. However,

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[1] The resolution states, in pertinent part: "The Berkeley Marina advocates and practices equal opportunity in terms of access to its berthing facilities. Availability and use of the facilities will not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition." The Berkeley Municipal Code, section 13.28.060, also prevents Berkeley from discriminating based on sexual orientation in the provision of all city services.

[2] Appellants did agree to a modified version of a "don't ask, don't tell" program, in which appellants stated that they considered such matters as sexual orientation to be a private matter, which they would not ask anyone to divulge, and appellants agreed to obey any laws actually forbidding them from engaging in any illegal discrimination. Appellants also pointed out that some of their participants in the past

(continued...)

even in the absence of compliance with the nondiscrimination program, appellants were permitted to maintain their boats berthed at the marina, for a fee, as other members of the public are allowed to do. Appellants were required to pay an additional $433 per month to berth their large vessel, the Farallon, as they continued to do so.

Appellants, a group of individual Sea Scouts, brought this action alleging Berkeley had, inter alia, breached their contractual rights, and violated their First Amendment rights, civil rights, and equal protection rights.

Berkeley initially removed the action to federal court. However, United States District Judge Susan Illston ordered that the matter should be remanded to state court on procedural grounds, since one of the individual defendants who had been served was not joined in the removal petition.

Berkeley filed a demurrer to appellants' various causes of action in the Alameda Superior Court. The court construed Berkeley's demurrer as a motion for judgment on the pleadings, and granted it with leave to amend. Appellants filed an amended complaint, with almost identical claims.

Berkeley then filed a further demurrer, to all claims in the amended complaint. The trial court sustained Berkeley's demurrer without leave to amend, ruling that: (1) appellants

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[2] (...continued)
had been persons who were atheists or who had presumably not been heterosexuals, and appellants had not discriminated against those persons. However, appellants did not and could not agree not to discriminate on these grounds in the future, because the Boy Scouts of America would not allow appellants to agree to such conditions without losing their Boy Scout charter, and appellants had to obey because they were securing their marine insurance at favorable rates through the Boy Scouts of America.

had no valid contract with Berkeley requiring the city to abstain from charging appellants rent or enforcing its nondiscrimination policy; and (2) appellants were not deprived of their First Amendment rights, civil rights, or equal protection rights, and they were treated the same as any other group that discriminates. The trial court did not reach another issue, Berkeley's argument that appellants as individuals had no standing to assert the rights of the Berkeley Sea Scouts organization. A judgment of dismissal was entered, and appellants brought this appeal.

II. DISCUSSION

A. STANDARD OF REVIEW

Initially, the parties to this appeal dispute the proper standard of review. Berkeley suggests we may only reverse the judgment of dismissal if the trial court abused its discretion in denying leave to amend, while appellants argue we must exercise de novo review.

Appellants are correct on this issue. On appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend, we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal. 4th 412, 415 (*McCall*).) We assume the truth of all material facts properly pleaded, as well as facts that may be implied or inferred from those expressly alleged. (*Rose v. Royal Ins. Co.* (1991) 2 Cal. App. 4th 709, 716.)

B. THE TRIAL COURT'S RULING WAS CORRECT.

On de novo review, we conclude appellants have not pled legally valid claims for breach of contract or similar quasi-contractual claims such as estoppel. Nor have they stated

a cause of action based upon violations of their First Amendment rights, civil rights, or equal protection rights.

1. Contract Claims

Appellants, in their first three causes of action, attempt to assert claims for breach of a written contract and a covenant implied into such a contract (first cause of action); an oral contract (second cause of action); and estoppel (third cause of action). Appellants based these claims on prior resolutions of the city council dating from 1945 and 1969, which had favored the goals of scouting and the Sea Scouts. Those resolutions allowed the Sea Scouts organization to enjoy a waiver of fees for berthing boats, after the Boy Scouts of America granted Berkeley permission to use rocks from a Boy Scout camp to create fill at the marina during the late 1930's and early 1940's, in an informal accommodation referred to by appellants as the "rocks for docks" deal.

However, no lease or contract rights were granted by the resolutions, which provided at most only a permit, subject to Berkeley's rules and regulations and also subject to cancellation on 30 days' notice. The first, 1945 resolution, No. 27,738, reads in pertinent part: "WHEREAS, the Boy Scouts of America have filed a request for the use without charge of one open berth and mooring facilities for seven boats in the Berkeley Yacht Harbor; . . . [¶] . . . [¶] NOW, THEREFORE, Be it Resolved that the Boy Scouts of America are hereby granted the use without charge of one berth and mooring facilities for seven boats to be designated by the Harbormaster. [¶] RESOLVED FURTHER, that said berth and mooring facilities shall be used by the Boy Scouts of America in accordance with all rules and regulations established by the City of Berkeley relative to the Berkeley Yacht Harbor, and said permission herein granted is subject to revocation by a 30 day written notice." Similarly, the second, 1969 resolution,

No. 42,885 provided a permit for six berths, two dry storage spaces, and one dock locker, without charge, but also stated: "The City of Berkeley reserves the right to revoke this permit at any time upon thirty (30) days written notice . . . ."

Significantly, appellants' "contract" claims do not arise from any explicit contractual language made enforceable under the Berkeley city charter, but arise from the language of the two resolutions of the city council, which could be changed, modified, or limited prospectively in the future, as Berkeley has done. In fact, the resolutions appellants rely on specifically state that the program allowing free rent for boat berths was subject to all rules and regulations regarding marina facilities, and could be terminated at any time, on 30 days' notice. Appellants do not contend they were not given 30 days' notice of the requirement to pay rent in the future, and the purported "contract" created by the resolutions contained no substantive terms which would establish Berkeley breached such a "contract." Berkeley's demurrer to such claims was therefore properly sustained. (See *McCall, supra*, 25 Cal. 4th at p. 415.)

Appellants' contract or quasi contract claims are also infirm on another closely related ground. There was no contract complying with the formal requirements of section 65 of the Berkeley city charter.[3] To create an enforceable contract with Berkeley, the city charter requires authorized execution by a city officer and approval by countersignature of the city auditor. This requirement was not met. (See *San Francisco Internat. Yachting etc. Group v. City and County of San Francisco*

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[3] Section 65 of the Berkeley city charter provides: "All contracts shall be drawn under the supervision of the City Attorney. All contracts must be in writing, executed in the name of the City of Berkeley by an officer or officers authorized to sign the same, and must be countersigned by the Auditor, who shall number and register the same in a book kept for that purpose."

(1992) 9 Cal. App. 4th 672, 683-684 [Per Haning, J., in the absence of a signed contract complying with the formal requirements of a city charter, no binding contract existed; the demurrer was properly sustained.] (*San Francisco Internat. Yachting*).) Neither of the two resolutions was ever approved as a binding contract by the authorized signature of an officer and the city auditor, as the Berkeley city charter requires, and the very language of the resolutions shows that the city council did not intend to create contractual rights enforceable in perpetuity. (See *ibid.*)[4]

For similar reasons, the trial court sustained the demurrer to the appellants' third cause of action for "estoppel." Such an estoppel cannot arise when the formal requirements for a city contract specified in a municipal charter are not met. (See *San Francisco Internat. Yachting, supra*, 9 Cal. App. 4th at pp. 683-684.) We distinguish in this regard the case of *Berkeley Lawn Bowling Club v. City of Berkeley* (1974) 42 Cal. App. 3d 280, 285-289 (*Berkeley Lawn Bowling*), relied on by appellants. There, the court was called upon to interpret a series of *written* leases and other *written* agreements between Berkeley and a private group of lawn bowling enthusiasts. Questions surrounding the lack of a written agreement authorized under the Berkeley city charter were simply never addressed.

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[4] Appellants concede the resolutions were not approved and signed by the city auditor, as would be required for a contract binding on Berkeley under its charter, although appellants suggest we should find there was substantial compliance with other legal requirements. However, the fact remains the necessary formal requirements were not met, probably because no one at the time believed these resolutions created any contract rights. That assumption was correct, and the resolutions do not have any contractual terms which Berkeley breached, even if the other legal requirements for an enforceable contract had been met, which they were not. (See *San Francisco Internat. Yachting, supra*, 9 Cal. App. 4th at pp. 683-684.)

In addition, we find that appellants did not plead the requirements for such an estoppel, as the trial court pointed out. (Cf. *Berkeley Lawn Bowling, supra*, 42 Cal. App. 3d at pp. 285-289 [Lawn bowlers had detrimentally relied on written agreements with Berkeley concerning construction of a club house next to city-maintained bowling greens.] Although appellants had received more than 50 years of rent-free boat berthing, they could not plead detrimental reliance since the Berkeley resolutions providing this free rent arrangement were not formal written contracts and could be terminated at any time on 30 days' notice, could always be altered, or could be limited by subsequent resolutions or other legislation. (Cf. *ibid.*)

We therefore agree that appellants presented no valid claim of breach of any contractual rights or estoppel, nor could they amend their complaint to do so. The trial court properly sustained the demurrer to these causes of action. (See *McCall, supra*, 25 Cal. 4th at p. 415.)

2. Appellants Were Not Deprived of Their First Amendment Rights.

Appellants, joined by the amici Pacific Legal Foundation and Pacific Justice Institute, who have filed amicus briefs with our permission, next maintain that their free speech and free association rights were violated by the decision of Berkeley to end the city subsidy of free rent for appellants' boat berths. This argument is also unconvincing.

In the fourth cause of action of the amended complaint, appellants allege Berkeley violated their civil rights under the state Unruh Civil Rights Act, Civil Code section 51 et seq., by infringing their right to free speech, free association, and equal protection. In the fifth and final cause of action, appellants also assert similar claims of deprivation of their First Amendment

and other constitutional rights, under the provisions of 42 United States Code section 1983.[5]

Appellants did not and could not plead a cause of action based upon the deprivation of their First Amendment rights. They were treated the same as any other private citizens or groups who desire to rent berths at the marina, and must pay a rental fee. Appellants did not qualify for a city subsidy, free rent, which is made available to some nonprofit, nondiscriminating groups, because they declined to adhere to Berkeley's nondiscrimination policy. Appellants thus remained free to exercise their First Amendment rights, and berth their boats at the marina, albeit without a city subsidy. Berkeley's actions have not required appellants to stop discriminating in these regards, which they remain free to do.

The present case therefore does not involve an order to cease discrimination; nor does it involve a denial of access to a public forum, or public employment, public benefits provided to all citizens by law, or public property, based upon the content of speech or a particular desire to associate, as in the cases cited by appellants and amici. (Cf. *Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 659 [Boy Scouts were improperly *ordered* to cease discriminating under state law.] (*Boy Scouts of America*); *Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993) 508 U.S. 384, 394-397 [Religious group could not be forbidden to show a certain film on public property, merely because the film had a religious viewpoint]; *Rosenberger v. Rector and Visitors of the Univ. of VA* (1995) 515 U.S. 819, 837 [Public university could not deny access to university funding for a religious organization's newspaper based on its viewpoint, while granting such funding to all other

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[5] 42 United States Code section 1983 provides, in pertinent part, that any persons deprived of their constitutional rights "under color of" any state statute or ordinance may bring suit for redress.

viewpoints.]; *Perry v. Sindermann* (1972) 408 U.S. 593, 596-597 [Public employment could not be denied to a particular person, based upon his speech or political views.]; *Sherbert v. Verner* (1963) 374 U.S. 398, 404-405 [Public unemployment benefits made available to all qualifying employees could not be denied based upon an applicant's religious views.]; *Torcaso v. Watkins* (1961) 367 U.S. 488, 495-496 [Public employment could not be reserved for those willing to sign a declaration that they believed in God.]; *Speiser v. Randall* (1958) 357 U.S. 513, 529 [California could not require a taxpayer's signature on a loyalty oath as part of a tax filing.].) The rationale of these cited cases, with which we concur, is that the state may not order, forbid, or require a particular type of political or religious speech or association in order to favor or disfavor a particular viewpoint.

However, Berkeley has not attempted to muzzle anyone's speech, and Berkeley has not ordered appellants to cease discriminating or associating as they please. Berkeley has only prevented appellants from enjoying a certain city subsidy, free rent, unless appellants' program is open to all residents without regard to the barriers created by the types of invidious discrimination Berkeley seeks to discourage. The federal Supreme Court and the California Supreme Court have held and indicated that the use of such a criterion of nondiscrimination for a public subsidy, intended for private nonprofit organizations open to all persons, would not violate the free speech rights of private discriminating organizations not qualifying for the subsidy. (*Grove City College v. Bell* (1984) 465 U.S. 555, 575-576 [A subsidy conditioned on compliance with antidiscrimination goals did not violate the First Amendment rights of a noncomplying college.] (*Grove City*); accord, *Bob Jones University v. United States* (1983) 461 U.S. 574, 602-604 [Government may condition a subsidy created by tax exempt status on a lack of illegal discrimination by nonprofit organizations.] (*Bob Jones*); *Regan v. Taxation With*

Representation of Wash. (1983) 461 U.S. 540, 549 [Subsidy under tax laws for nonprofit organizations could be conditioned upon limitations on their exercise of their First Amendment rights.] (*Regan*); *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal. 4th 670, 701 [Tax exempt subsidy status could be removed from the Boy Scouts, if they engaged in forbidden discrimination.] (*Curran*).)

Thus, it has uniformly and repeatedly been held permissible to condition a public subsidy on compliance with nondiscrimination policies. For example, *Grove City, supra*, dealt with a public subsidy provided to certain colleges to defray or supplement the tuition paid by students. The subsidy was conditioned on compliance with an antidiscrimination policy, requiring the colleges to agree not to discriminate against students based on protected status, including sex. One college and its students argued that this condition or restriction on the subsidy violated the First Amendment rights of the college and its students, including their right of association. The federal Supreme Court unanimously rejected this argument: "Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the [subsidy] program infringes no First Amendment rights of the College or its students." (*Grove City, supra*, 465 U.S. at pp. 575-576.) Similarly, in our case, a nondiscrimination condition on the public subsidy of free boat berths does not violate the First Amendment rights of appellants.

In *Bob Jones, supra*, 461 U.S. at pages 603-604, the federal Supreme Court dealt with a nondiscrimination condition which had been attached to the federal tax law requirement of charitable status, allowing favorable tax treatment of nonprofit foundations. A university contended its First Amendment right to freedom of religion had been violated by this condition, requiring it to cease discriminating in order to receive the

subsidy of favorable tax status. The federal Supreme Court rejected this argument, observing that denial of a tax subsidy did not violate any First Amendment rights, because the university remained free to observe its own religious principles in favor of discrimination, albeit without a subsidy: "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets." (*Ibid.*) Likewise, in the present case Berkeley has not prevented appellants from associating as they please; it has simply prevented them from collecting a subsidy, unless they agree not to discriminate.

Similarly, in *Regan, supra*, 461 U.S. at page 549, a subsidy under certain federal tax laws was made available to nonprofit organizations, but only on the condition that they not exercise their First Amendment rights in certain ways. The high court ruled, (per Rehnquist, J.) that even though the right in question was protected by the First Amendment, this public subsidy could validly be conditioned upon an agreement by the recipient organizations that they would not exercise these First Amendment rights, because the mere "decision not to subsidize the exercise of a fundamental right does not infringe the right . . . ."

More recently, the California Supreme Court ruled, in *Curran, supra*, 17 Cal. 4th at page 701, that the Boy Scouts of America was not a "business establishment" of the type that could be ordered not to discriminate under California's Unruh Civil Rights Act; however, the high court also indicated a subsidy, such as tax exempt status could be removed from the Boy Scouts, if they engaged in forbidden discrimination. "To begin with, even though the provisions of the Unruh Civil Rights Act do not apply to the membership policies of the Boy Scouts, it does not follow, as the trial court assumed, that the Boy Scouts are therefore free to exclude boys from membership

on the basis of race, or on other constitutionally suspect grounds, with impunity. The Unruh Civil Rights Act is not the only legislative measure that is aimed at curbing discrimination on the basis of race, and in other contexts courts have upheld the imposition of a variety of sanctions—including the denial of tax-exempt status—upon an otherwise qualified nonprofit entity that engages in racial discrimination. (See, e.g., *Bob Jones University v. United States* (1983) 461 U.S. 574 . . . .)" (*Curran, supra*, at p. 701.) Similarly, Berkeley has not ordered or required appellants or the Boy Scouts to cease discriminating, but instead conditioned a city subsidy on compliance with nondiscrimination principles.

The case law from higher courts uniformly supports Berkeley's conditioning of a subsidy upon adherence to such nondiscrimination principles.[6] We are bound by these rulings

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[6] For an interesting examination in greater depth of the possible constitutional problems created by governmental subsidies and the restrictions which may be placed on them, see the extensive discussion by Professor (now Dean) Kathleen M. Sullivan in *Unconstitutional Conditions* (1989) 102 Harv. L. Rev. 1415, 1499-1506. Among the questions raised by this article is the following: Why is it that governments may use conditions on subsidies, but not direct orders, to favor certain types of political goals affecting rights of free speech and association? Logically, perhaps, it is difficult to justify the existing distinction in the case law between the two types of governmental action. The full ramifications of this constitutional question may raise difficult theoretical issues which are beyond the scope of the present appeal, but no court has ever held governments may not provide or condition subsidies to favor groups adhering to genuine nondiscrimination goals, and the existing case law, cited in the text above, uniformly favors the constitutionality of similar restrictions on governmental subsidies. The reason for the distinction in the case law may lie only in the pragmatic observation that it is one thing to offer a subsidy to encourage a boat captain to take on passengers or crew, and quite

(continued...)

and follow them. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455.) The trial court properly sustained respondent's demurrers to these First Amendment claims. (*See McCall, supra*, 25 Cal. 4th at p. 415.)

3. Other Issues

Appellants maintain their partial willingness to comply with the city's nondiscrimination policy, through a form of "don't ask, don't tell" compromise, should have been enough to establish compliance with the Berkeley nondiscrimination policy, and they contend their rights were violated by Berkeley's insistence on more stringent nondiscriminatory language. However, the requirement that appellants explicitly agree to comply with Berkeley city policy, by specifically agreeing not to discriminate against those persons of whose sexual orientation appellants become aware, did not violate appellants' First Amendment rights, since it was merely a permissible and reasonable condition placed upon receipt of a public subsidy. (See *Grove City, supra*, 465 U.S. at pp. 575-576.)

Appellants also suggest they are being penalized for exercising their First Amendment rights in deciding to associate with certain persons or groups, including the national Boy Scouts of America organization, and appellants contend they are being punished for declining to protest against the discriminatory policies of the national scouting organization.

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[6] (...continued)
another thing to order him to do so. Of course, public subsidies are usually granted in order to further some public purposes, and it would be a surprising result if subsidies were required to be paid to those who would not agree to comply with conditions designed to further those purposes. (See *Grove City, supra*, 465 U.S. at pp. 575-576.)

However, Berkeley never required appellants to cease associating, engage in protest or speech, or do anything in those respects in order to receive a subsidy. The only thing appellants had to do to receive a subsidy was to agree to comply in the future with Berkeley's nondiscrimination policy. Appellants did not agree, apparently because the national scouting organization was providing low cost marine insurance, and would not permit appellants to so agree. This does not show any violation of appellants' First Amendment rights by Berkeley, which could require compliance with antidiscrimination policies from those receiving a city subsidy. (See *Grove City, supra*, 465 U.S. at pp. 575-576.)

Further, there is no merit to appellants' related claims that their civil rights or equal protection rights were violated. Appellants were not denied any of the rights enjoyed by other citizens, i.e., the right of free speech and association, the right to due process, or even the specific right to use the marina, for a regular fee. Appellants were treated the same as other private parties who receive no rent subsidy from the city, and who need not agree to comply with the Berkeley policy against discrimination.

Although other nonprofit groups may qualify for a subsidy, should they comply with Berkeley City resolution No. 58,859-N.S., this does not demonstrate a denial of equal protection as to appellants, because they are not similarly situated. (See *Maher v. Roe* (1977) 432 U.S. 464, 470-477 [state's decision to fund pregnancy-related medical expenses, but not abortions, did not violate the equal protection rights of those who did not qualify for a subsidy because they desired to exercise their protected right to end their pregnancies.].) Appellants had not agreed to comply with the Berkeley nondiscrimination policy, so they were obviously not similarly situated with those other organizations who agreed to comply. (See *ibid.*; *Grove City*, *supra*, 465 U.S. at pp. 575-576.)

Finally, appellants insist they had First Amendment rights to associate or speak with whomever they pleased, and they claim Berkeley has penalized those rights, by removing the subsidy of free rent for their boat berths. It is true that appellants' decision not to comply with Berkeley's antidiscrimination conditions would arguably be protected in other contexts by the First Amendment. (See *Boy Scouts of America, supra*, 530 U.S. at p. 659 [state could not simply order an end to certain types of discrimination]; *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) 515 U.S. 557, 567-581 [state could not order organizations to include other groups in a parade].) However, this does not mean Berkeley would be required by equal protection or First Amendment principles to automatically grant appellants the public subsidy of free rent on boat berths, which was intended for those who agree to comply with the nondiscrimination conditions placed on this public subsidy. (See *Grove City, supra*, 465 U.S. at pp. 575-576; *Regan, supra*, 461 U.S. at p. 549.)

The trial court's judgment of dismissal, following its ruling sustaining the demurrer, is affirmed as to all of appellants' claims. (See *McCall, supra*, 25 Cal. 4th at p. 415.)[7]

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[7] In light of these conclusions, rejecting appellants' claims on the merits, we need not reach the additional issue of whether the individual appellants had standing to pursue all of their contractual claims and other related claims. The trial court did not reach this issue, finding it moot. (*Finnie v. Town of Tiburon* (1988) 199 Cal. App. 3d 1, 10.)

III. DISPOSITION

The judgment of dismissal is affirmed.

STEVENS, J.

We concur.

JONES, P.J.

GEMELLO, J.

(A097187)

Appendix C–1

Filed 11/06/01

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

EUGENE EVANS, et al., Plaintiffs, v. CITY OF BERKELEY, et al., Defendants.	No. 809180-4 ORDER SUSTAINING DEMURRERS TO FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND Date: October 9, 2001 Time: 2:00 p.m. Dept.: 31 (Hon. James A. Richman)

The General Demurrers to the First Amended Complaint and to each cause of action in that Complaint filed on behalf of Defendants City of Berkeley, City Council of the City of Berkeley, and City of Berkeley Waterfront Commission (hereafter, when referred to collectively, "Defendants") came on regularly for hearing on October 9, 2001, in Department 31 of the above-entitled Court, the Honorable James A. Richman presiding. Assistant City Attorney Laura McKinney appeared on behalf of Defendants. Jonathan Gordon appeared on behalf of Plaintiffs.

After full consideration of the Demurrers, the briefs in support and in opposition thereto, the authorities cited by the parties, the documentary evidence for which Respondents requested judicial notice, and the oral arguments presented at the hearing, and the matter having been submitted for decision, and good cause appearing, IT IS HEREBY ORDERED AS FOLLOWS:

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1. The Demurrers to the First Cause of Action for Breach of Contract in Writing/Implied Covenant of Quiet Enjoyment, the Second Cause of Action for Breach of Oral/Implied Contract, and the Third Cause of Action for Estoppel are sustained without leave to amend. The municipal charter of the City of Berkeley requires that all contracts with the City shall be in writing and be executed by an officer authorized to sign on behalf of the City. (Berkeley Municipal Charter Section 65.) The Resolutions upon which Plaintiffs rely do not satisfy the requirements of Charter Section 65 (see First Amended Complaint at ¶¶ 19-23; and Exhibits C and D thereto) and, thus, Plaintiffs cannot state a cause of action for breach of written contract. (See *Dynamic Industries Co. v. City of Long Beach* (1958) 159 Cal. App. 2d 294, 298-299 ["when a municipal charter contains an express limitation upon the mode in which the city may contract, the city is bound only by contracts executed in accordance with the charter provisions. . . ."].) Similarly, because the Charter requires that agreements with the City be in writing, Plaintiffs cannot state a cause of action for breach of oral/implied contract. Last, the law is clear that "when there has been no compliance with the relevant charter provision, the city may not be liable in quasi-contract and will not be estopped to deny the validity of the contract." (*San Francisco International Yachting v. City and County of San Francisco* (1992) 9 Cal. App. 4th 672, 683.) Accordingly, Plaintiffs cannot state a cause of action for estoppel as against these demurring Defendants.

2. The Demurrers to the Fourth Cause of Action for Violations of the Unruh Act and Berkeley Municipal Code/Resolution, and the Fifth Cause of Action for Violation of Constitutional Rights, Civil Code § 52.1, and Deprivation of Rights under Color of State Law, 42 U.S.C. §§ 1983, 1988, are sustained without leave to amend. Our nation's courts have held that public entities may condition public subsidies, such as free berthing space at a City-owned marina, upon the recipient's

compliance with state and local laws that prohibit discriminatory membership policies without violating First Amendment, Equal Protection, or Unruh Act principles. (See, e.g., *Bob Jones University v. United States* (1983) 461 U.S. 574, 595, 604; *Curran v. Mount Diablo Silverado Council* (1998) 17 Cal. 4th 670, 675, 701.) In addition to these bases, Plaintiffs' equal protection claim fails on the separate ground that Plaintiffs are not "similarly situated" to the other non-profit groups described in Plaintiffs' First Amended Complaint, all of which differ from Plaintiffs in that these groups maintain membership policies that are consistent with the City's non-discrimination policy. (See FAC ¶ 114.E; and Exhibits F through H to Defendants' Request for Judicial Notice filed April 2, 2001.)

3. In light of the foregoing rulings sustaining the Demurrers to each cause of action of the First Amended Complaint, the Court does not reach the issue of whether the individual Plaintiffs identified in the Complaint have standing to sue to enforce any rights as may be claimed or asserted by the separate and distinct association generally known as the Berkeley Sea Scouts.

4. The entire action is dismissed with prejudice, as against these demurring Defendants. Defendants to file and serve a proposed form of judgment by November 29, 2001.

IT IS SO ORDERED.

Dated: November 2, 2001

/s/ James A. Richman
James A. Richman
Judge of the Superior Court

Appendix C–4

Filed Jan. 8, 2002

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CITY OF BERKELEY

SUPERIOR COURTS OF ALAMEDA COUNTY

STATE OF CALIFORNIA

EUGENE EVANS, et al., Plaintiffs, v. CITY OF BERKELEY, et al. Defendant.	NO. 809180-4 **JUDGMENT**

The Court having sustained Defendants' Demurrers to Plaintiffs' First Amended Complaint without leave to amend and there being no further matters at issue in the case, accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that the entire action is DISMISSED WITH PREJUDICE.

Dated: JAN - 8 2002

By: /s/ James A. Richman
The Honorable James A. Richman
Judge of the Superior Court

Received Nov. 19, 2001

Appendix D–1

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Attorney for Plaintiffs

Filed 07/17/01

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA, NORTHERN DIVISION

EUGENE EVANS, BRUCE CARNES, AMANTUCK CAPPA-LAMBERT, RIMMON SCHURIK, ERIC DAVID, NATHANIEL BROWNLOW, MARIO LOPEZ, ANDERS NELSON, KEITH DEIRUP, JING ZHANG, TLACAELEL ALVAREZ TONATIUH ALVAREZ, JOSEPH FISHER, JAY UPPAL, as individual plaintiffs, and on behalf of all BERKELEY SEA SCOUT program participants, Plaintiffs, v. CITY OF BERKELEY, CITY OF BERKELEY-CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION and DOES 1 to 20, inclusive, Defendants.	Case No. 809180-4 **FIRST AMENDED COMPLAINT** Breach of Contract, Breach of Implied Covenant of Quiet Enjoyment, Implied Covenant of Good Faith and Fair Dealing; Breach of Oral Contract/ Implied Contract; Estoppel; Violations of Unruh Act and Berkeley Municipal Code/Resolution; Violation of Constitutional Rights: Deprivation of Rights Under Color of State Law

Appendix D–2

Plaintiffs EUGENE EVANS, BRUCE CARNES, AMANTUCK CAPPA-LAMBERT, RIMMON SCHURIK, ERIC DAVID, NATHANIEL BROWNLOW, MARIO LOPEZ, ANDERS NELSON, KEITH DEIRUP, JING ZHANG, TLACAELEL ALVAREZ, TONATIUH ALVAREZ, JOSEPH FISHER, and JAY UPPAL, as individual plaintiffs, and on behalf of all of the BERKELEY SEA SCOUT program participants, (all of the plaintiffs set forth in this paragraph are hereinafter collectively referred to as "Plaintiffs.") hereby allege as follows:

PRELIMINARY STATEMENT:

1. Plaintiffs EUGENE EVANS, BRUCE CARNES, AMANTUCK CAPPA-LAMBERT, RIMMON SCHURIK, NATHANIEL BROWNLOW, MARIO LOPEZ, KEITH DEIRUP, JING ZHANG, TLACAELEL ALVAREZ, TONATIUH ALVAREZ, JOSEPH FISHER, and JAY UPPAL, are and at all times herein mentioned were, residents of the County of Alameda. Plaintiffs ERIC DAVID and ANDERS NELSON, are and at all times herein mentioned were, residents of the County of Contra Costa.

2. Defendant CITY OF BERKELEY is, and at all times herein mentioned was, a municipal corporation organized and existing under and by virtue of the laws of the State of California, located in the County of Alameda.

3. Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL and CITY OF BERKELEY WATERFRONT COMMISSION are, and at all times herein mentioned were, political subdivisions of the City of Berkeley and/or the State of California, created and existing under and by virtue of the laws of the State of California, located in the County of Alameda.

4. Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 to 20, inclusive, are hereinafter referred to collectively as "Defendants."

5. On November 21, 1998, Plaintiffs served Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, and CITY OF BERKELEY WATERFRONT COMMISSION by mail, with claims for, inter alia, breaches of contract/covenants, the interference with constitutional/statutory rights, injuries, losses and damages suffered and incurred by Plaintiffs caused by the events and occurrences herein mentioned, in compliance with the requirements of the Government Code. Copies of the claims are attached hereto collectively as **Exhibit A** and incorporated by this reference: One complete claim form together with the face sheets of the other identically worded plaintiffs' claims are attached.

6. On or about January 19, 1999, Plaintiffs' claims were denied in full by defendant CITY OF BERKELEY. Copies of the notices of denial of the claims are attached hereto collectively as **Exhibit B** and incorporated by this reference.

7. The true names or capacities, whether individual, corporate, public entity, associate, or otherwise, of defendants named herein as DOE 1 through DOE 20, inclusive, are unknown to Plaintiffs, who therefore sues these defendants by such fictitious names, and Plaintiffs will amend this complaint to show their true names and capacities when the same have been ascertained; Plaintiffs are informed and believe, and on that basis allege, that each of the fictitiously named defendants designated DOE 1 through DOE 20, herein is negligently, legally, willfully or intentionally responsible for the breaches, for interference with Plaintiffs' civil/constitutional/statutory/legal rights, events and happenings herein referred to, and negligently, legally, by way of breach of

contract, willfully or intentionally caused injury and damages proximately thereby to Plaintiffs as herein alleged.

8. The agreements (oral/written/implied contract/estoppel/lease) herein alleged were entered into in the City of Berkeley, County of Alameda, State of California. The performance of the agreements oral/written/implied contract/estoppel/lease) herein alleged was to take place in the City of Berkeley, County of Alameda, State of California. The injuries to Plaintiffs herein alleged occurred in the City of Berkeley, County of Alameda, State of California.

9. Plaintiffs are informed and believe, and on that basis allege, that at the time of the events and occurrences herein mentioned, defendants, and each of them, were the agents, servants, officers and/or employees of the other remaining defendants and at all times herein mentioned were acting within the scope and course of such agency, service, authority, employment or ratification.

10. Plaintiffs and the Boy Scouts of America have fully performed all conditions, covenants, and promises required of them under the agreements (oral/written/implied contract/estoppel/lease).

11. At all times mentioned herein the BERKELEY SEA SCOUTS program has had no formal organizational administration. The BERKELEY SEA SCOUTS simply meet and have met informally on a weekly basis in a meeting room at a local church in the City of Berkeley. Anyone is and was permitted to attend the meetings and have their opinions heard at such meetings. Any action to be taken by the BERKELEY SEA SCOUTS generally was and is done by way of consensus opinion and is discussed by persons attending the meetings. Persons attending the meetings refer to themselves as Committee Members. Commonly, adult volunteers (many of

whom were formerly Berkeley Sea Scouts themselves), parents of Sea Scouts and the Skippers of the Sea Scouts ships attend the meetings and direct the actions of the BERKELEY SEA SCOUTS.

The BERKELEY SEA SCOUTS program is and at all times mentioned herein was an unfunded program. There is no budget. The BERKELEY SEA SCOUTS program traditionally has relied upon the Skippers and former members generosity to provide out of their own pockets needed goods, supplies, fuel, and services for continued operations. Although the Berkeley Sea Scouts program is associated/affiliated with the Boy Scouts of America, it receives no direct funding from the Boy Scouts of America. The cost of membership in the Berkeley Sea Scout program has been only seven dollars ($7) per year to the youth participant. However, some youth-participants are unable to afford to pay even that much. Many participants in the Berkeley Sea Scout program are economically disadvantaged youths.

The BERKELEY SEA SCOUT program has no full time or part time employees. None of the BERKELEY SEA SCOUT program participants is paid for their time. The BERKELEY SEA SCOUTS program is, and at all times mentioned herein was, made up of adult community volunteers who volunteer their time and skills to teach boys and girls ages 13 to 18 a variety of valuable vocational skills for youths including, without limitation, pipe-fitting, marine engine repair, electrical repair, wood working, large boat handling, small boat handling, navigation, rescue operations, sailing, carpentry, painting, sewing, metal working, fiber glassing, working together as a part of a team with other shipmates, and generally helping to develop skills for a future in a maritime career.

The BERKELEY SEA SCOUTS have included a variety of different "ships" since 1936. At all times mentioned herein

the BERKELEY SEA SCOUTS was made up collectively of two "ships" the Northland, Ship # 52 and the Farallon, Ship # 44. Each "ship" is the functional equivalent of a boy scout "troop" and may include more than one vessel, ship or boat. Peter Saugman at all times mentioned herein was the Skipper of the Northland, Ship # 52. Mr. Saugman is now deceased.

Plaintiff EUGENE EVANS at all times mentioned herein was and is the Skipper of the Farallon, Ship # 44. Plaintiff EUGENE EVANS has been a Sea Scout Skipper for over 27 years. Plaintiff EUGENE EVANS has been a Berkeley Sea Scout program participant ever since his youth in 1957 when he was just 13 years old. Plaintiff EUGENE EVANS is, and at all times mentioned herein was a practicing California credentialed teacher. Plaintiff EUGENE EVANS is the most senior of all of the Berkeley Sea Scout program participants still actively engaged in the program.

Each of the Plaintiffs has suffered injuries as a result of the actions of Defendants. These injuries include, inter alia, the unlawful discrimination against them by the Defendants including interference with and attempted interference with their First Amendment rights of freedom of association and freedom of speech, the threatened loss of the Northland ship to the Boy Scouts of America if plaintiffs complied with the demands of Defendants, loss of membership in the BERKELEY SEA SCOUTS due to an inability to pay the $7 membership fee formerly paid by the Skipper EUGENE EVANS who now pays over $500 per month in berth fees, a disintegration of the community outreach program due to a lack of funds, a general disintegration and scaling back of the program due to a lack of funds, a loss of formerly free services and events (such as cruises, meals, beverages and overnight camping trips) formerly paid for by the Skipper EUGENE EVANS who can no longer afford them, a diminished use of the Farallon ship for cruises due to a lack of funds, the threatened

loss of maritime liability insurance made available at a greatly reduced rate from the Boy Scouts of America if plaintiff's complied with the demands of Defendants, and the continuing loss each month for berth fees of over $500 per month at this time.

The Plaintiffs, including plaintiff EUGENE EVANS, at all times mentioned herein were all BERKELEY SEA SCOUTS program participants known as the BERKELEY SEA SCOUTS and were duly authorized to bring this action on behalf of themselves and in a representative capacity on behalf of the other BERKELEY SEA SCOUTS program participants, past and future. Plaintiffs have standing to bring this action on behalf of themselves as individuals and as the BERKELEY SEA SCOUTS: See **CODE OF CIVIL PROCEDURE** sections 369.5 and 382; **Tenants Association of Park Santa Anita v. Southers** (1990) 222 Cal. App. 3d 1293, 1299-1304; **Residents of Beverly Glen, Inc. v. City of Los Angeles** (1973) 34 Cal. App. 3d 117, 127, 128; **Stocks v. City of Irvine** (1981) 114 Cal. App. 3d 520, 532; **Raven's Cove Townhomes, Inc. v. Knuppe Development Co.** (1981) 114 Cal. App. 3d 783, 793-795.

12. The factual allegations, interests and legal issues averred in the following paragraphs of this Complaint are common to all of the above individually named Plaintiffs (who are all BERKELEY SEA SCOUT program participants) as well as the unnamed participants of the Berkeley Sea Scout program on whose behalf the individual plaintiffs also sue. Proceeding via this representative action for participants of the Berkeley Sea Scout program provides substantial benefits for the Court as well as the litigants. Considerations of necessity, convenience, expedience, judicial economy and justice warrant proceeding via this representative procedure. The participants of the Berkeley Sea Scout program will be adequately represented and their interests protected via this representative

action. The interests of the participants of the Berkeley Sea Scout program are identical to the individual plaintiffs named herein who are comprised of a representative sampling of adult volunteers and youths who participate in the Berkeley Sea Scouts program.

The parameters of the Berkeley Sea Scouts represented in this action are as follows: Those Berkeley Sea Scout youths and adult volunteers who were involved with the Berkeley Sea Scouts program conducted on the Farallon, Ship #44 or the Northland, Ship #52 at any time from February 1, 1998, through November 21, 1998. Individual losses of many Berkeley Sea Scouts program participants do not appear to be great enough to warrant separate actions. The Berkeley Sea Scout program participants are an ascertainable class and they share a well-defined community of interest among their members. The Berkeley Sea Scout program participants number approximately 150 persons and it is impracticable to bring them all before the Court. Thus, the above-named Plaintiffs (who are all Berkeley Sea Scout program participants) sue individually as well as for the benefit of all Berkeley Sea Scout program participants on the interests and issues alleged in this Complaint that are common to them all.

13. In or around 1936 or 1937 the Mount Diablo Council of the Boy Scouts of America ("Boy Scouts") reached an agreement (oral/implied contract/estoppel) with the City of Berkeley, whereby the Boy Scouts permitted the City of Berkeley to quarry and remove 40,000 tons of rock and fill from the hills of Camp Berkeley (owned by the Boy Scouts of America) during the year 1937 for use in the construction of the Berkeley Marina and the sea wall breakwater for the Berkeley Marina which was being constructed during that time. In exchange, the City of Berkeley was to provide permanent free mooring and berthing rights for the boats/ships of the Berkeley Sea Scouts in the Berkeley Yacht Harbor/Marina.

14. The agreement (oral/implied contract/estoppel) with the City of Berkeley was made for the express benefit of the Berkeley Sea Scouts and adult volunteers then participating in the Berkeley Sea Scouts program, as well as for the benefit of all future Berkeley Sea Scouts and all adult volunteers who would participate in the Berkeley Sea Scouts program in the future. Each of the Plaintiffs at all times mentioned herein was either a Berkeley Sea Scout or adult volunteer participating in the Berkeley Sea Scouts program, and was a participant in the Berkeley Sea Scouts program since at least January of 1998. Each of the Plaintiffs is also an aggrieved party for the purpose of asserting all applicable constitutional, statutory and common law rights and remedies mentioned in this action.

15. The rock and fill which the Boys Scouts permitted to be removed from Camp Berkeley pursuant to the agreement (oral/implied contract/estoppel) was worth approximately $0.25-$0.50 per ton in 1937. At that price, the 40,000 tons of rock and fill provided by the Boy Scouts on behalf of the Sea Scouts to the City of Berkeley would have cost between ten and twenty thousand dollars ($10,000-$20,000) in 1937. In 1937, berth rental at the Marina for boats over 35 feet was only five dollars ($5) per month.

16. In furtherance of that agreement (oral/implied contract/estoppel) with the City of Berkeley, the Boy Scouts continued to permit the City of Berkeley without any charge to remove an additional 40,000 tons of rock and fill from Camp Berkeley (to become known as Camp Herms in 1939) during the years 1938 to 1942 for use in the construction of the road around Berkeley's Aquatic Park, which was also being constructed during that period of time.

17. The rock and fill which the Boys Scouts permitted to be removed from Camp Berkeley in 1938-1939 was worth between $0.25 and $0.82 per ton. At that price, the second

40,000 tons of rock and fill would have cost between ten thousand dollars ($10,000.00) and thirty two thousand eight hundred dollars ($32,800.00) during those years. In 1937, berth rental at the Marina for boats over 35 feet was only seven dollars and fifty cents ($7.50) per month.

19. A variety of Berkeley City Council resolutions were enacted relating to the above described (oral/implied contract/estoppel) arrangements between the City of Berkeley, Boy Scouts and the Sea Scouts.

20. In 1945, the City of Berkeley confirmed, via City Council Resolution, (Resolution No. 27.738, N.S.) that the Boy Scouts and Sea Scouts were granted the use of berth and mooring facilities in the Berkeley Yacht Harbor without charge. The Boy Scouts and Sea Scouts were to comply with all rules and regulations applicable to the Berkeley Yacht Harbor and the free use of the facilities was made revocable on 30 days written notice.

21. From 1937 to 1969, the Berkeley Sea Scouts and their adult volunteers enjoyed berth and mooring facilities in the Berkeley Yacht Harbor without charge or incident.

22. In 1969, the City of Berkeley Waterfront Manager recommended discontinuing free berthing for the Sea Scouts boats/ships for financial reasons. In 1969, the City of Berkeley, via City Council Resolution, (Resolution No. 42,885, N.S.) then agreed in writing to provide the Boy Scouts, for use by the Berkeley Sea Scouts, the use of six boat berths, two dry storage spaces and one dock locker without charge at the Berkeley Marina. The Boy Scouts and Sea Scouts were to comply with all rules and regulations applicable to the Berkeley Marina and the free use of the facilities was made revocable on 30 days written notice to be given by the City Manager of the City of

Berkeley. The Boys Scouts agreed to be bound by the terms of that Resolution (written/implied contract/lease).

23. That Resolution agreement (written contract/implied contract/lease) with the City of Berkeley was made for the express benefit of the Berkeley Sea Scouts and adult volunteers then participating in the Berkeley Sea Scouts program, as well as for the benefit of all future Berkeley Sea Scouts and all adult volunteers who would participate in the Berkeley Sea Scouts program in the future.

24. From 1969 to May 21, 1998, the Berkeley Sea Scouts and their adult volunteers enjoyed free berths, dry storage spaces and a dock locker in the Berkeley Marina without charge.

25. Because Defendants vehemently disagreed with the national Boy Scouts of America organization viewpoints and policies of excluding avowed homosexuals (sexual orientation) and atheists (religious belief) from the Boy Scouts of America organization, Defendants decided to punish and intentionally discriminated against the completely innocent children and community volunteer Plaintiffs BERKELEY SEA SCOUTS by deliberately targeting them in efforts to run them out of town because of their affiliation/association with the Boy Scouts of America organization. On March 4, 1997, Defendants used the vehicle of a City Council resolution (Resolution No. 58,859, N.S.) to attempt to run the Plaintiffs BERKELEY SEA SCOUTS out of the Berkeley Marina.

That Resolution provided, inter alia, that the availability and use of the facilities of the Berkeley Marina would not be predicated on a person's religious or sexual orientation. That Resolution applied to the free use of berth space in the Berkeley Marina and to no other area of the City. That Resolution (Resolution No. 58,859, N.S.) applied to only the Berkeley Sea

Scouts and to no other group. At the time, the Berkeley Sea Scouts was the only group receiving free berth space in the Marina.

Defendants efforts to run the BERKELEY SEA SCOUTS out of the Berkeley Marina because of their association with the Boy Scouts were somewhat successful. The BERKELEY SEA SCOUT ship Northland was forced to leave the Berkeley Marina, because they could not afford to pay the demanded berth fees—a fact well known to the Defendants at the time. This violated the Berkeley Sea Scouts rights to freedom of association and equal protection of the laws.

26. The California Supreme Court has decreed that the Boy Scouts of America's policy of discriminating against homosexuals and atheists participation in the Boys Scouts organization is lawful under the public accommodation laws of California. See **Curran v. Mount Diablo Council of the Boy Scouts** (1998) 17 Cal.4th 670. The United States Supreme Court has also decreed that the Boy Scouts of America's policy of discriminating against homosexuals and atheists participation in the Boys Scouts organization is lawful under public accommodation laws. See **Boy Scouts of America v. Dale** (2000) __ U.S. __, 120 S. Ct. 2446. Any contrary or conflicting actions enactments, resolutions, or other actions on the part of the City of Berkeley in this respect are preempted by State and Federal law.

These policies of the Boy Scouts have rendered the organization very unpopular recently.

27. From 1937 when the Sea Scouts began using the City of Berkeley's Yacht Harbor/Marina without charge through (2/18/99) some 60+ years later, the Berkeley Sea Scouts have not ever discriminated against one, single, solitary person on the

basis of that person's sexual orientation, religion (or atheism), race, creed, color, sex, ethnicity, or national origin.

Defendants have simply erroneously presumed, without holding any due process hearing on the matter, that the Berkeley Sea Scouts were guilty of unlawful discrimination. However, that presumption is and was false, and it has resulted in depriving the Plaintiffs Berkeley Sea Scouts of due process of law. No homosexual, atheist or any other person has ever been harmed or discriminated against by the Berkeley Sea Scouts. There has simply never been any discriminatory conduct on the part of the Berkeley Sea Scouts ever.

The Due Process Clause does not permit a state, in attempting to bar state benefits to a person on the basis of organizational membership to arbitrarily classify innocent persons with others in the organization who have committed unlawful acts. Such a classification is patently arbitrary and discriminatory. **Wieman v. Updegraff** (1952) 344 U.S. 183. 190-193.

28. No fact-finding hearing has ever been held by the City of Berkeley its agents or agencies on whether or not the Plaintiffs Berkeley Sea Scouts have ever actually discriminated against anyone. Yet, their right to free use of the facilities at the Berkeley Marina has been terminated because of their association with the Boy Scouts and Defendants claimed fear that Plaintiffs might unlawfully discriminate against homosexuals and atheists in the future. This violates Plaintiffs freedom of association rights.

The United States Supreme Court has consistently disapproved governmental action denying rights and privileges solely because of a citizen's association with an unpopular organization. Guilt by association alone, without establishing that an individual's association poses the threat feared by the

government, is an impermissible basis on which to deny First Amendment rights. The government has the burden of proving a knowing affiliation with an organization possessing unlawful aims and goals and a specific intent to further those illegal aims. **Healy v. James** (1972) 408 U.S. 169, 185-186 [Denial of free use of public facilities based on plaintiffs' association with unpopular organization held unconstitutional violation of freedom of association]. The Boy Scouts goals here, however, have been decreed lawful by the highest courts of our land.

Moreover, where there was no evidence that the particular Plaintiffs acting together would cause the feared illegal activities, such fears do not support the infringement of the right to freedom of expression. **Healy v. James** (1972) 408 U.S. 169, 190-191. Here, there is no evidence that Plaintiffs or any participant in the Berkeley Sea Scouts program was going to unlawfully discriminate against anyone, yet they have been penalized by the deprivation of the continued free use of the public facilities.

This also violated the Berkeley Sea Scouts, rights of freedom of speech, to due process of law and equal protection of the laws. The United States Supreme Court has never approved a classification that aids persons perceived as members of relatively victimized groups (i.e., gays and atheists) at the expense of other innocent individuals (i.e., Sea Scouts) in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. **Regents of the University of California v. Bakke** (1978) 438 U.S. 265, 308, 98 S.Ct. 2733, 2757. There have been none by Plaintiffs Berkeley Sea Scouts.

29. The membership of the Berkeley Sea Scouts in 1997 and continuing through 1998 reflects the ethnic diversity of the City of Berkeley and the East Bay Area with membership being approximately 40% Euro-American, 20% African-American,

20% Hispanic, 10% Asian-American, and 10% Filipino-American and Pacific Islander. There is also participation by girls in Sea Scout activities.

Although the Berkeley Sea Scouts program is associated/affiliated with the Boy Scouts of America, it receives no direct funding from the Boy Scouts of America. The BERKELEY SEA SCOUT program does, however, receive maritime liability insurance coverage on the Sea Scouts boats at a greatly reduced rate from the Boy Scouts of America.

30. On February 11, 1998, the City of Berkeley Waterfront Commission held a meeting at which the continuation of the historically free use of the facilities of the Berkeley Marina by the Sea Scouts was considered. The Waterfront Commission for the first time confronted the Plaintiffs Sea Scouts regarding the national Boy Scouts organization policies of discrimination against homosexuals and atheists which the Commission stated conflicted with the City of Berkeley's March 4, 1997, resolution (Resolution No. 58,859, N.S.). The matter was continued to March, 1998.

31. On February 19, 1998, Jamie Wasson, Chairperson of the City of Berkeley Waterfront Commission, stated to the Plaintiffs Sea Scouts that the Commission believed that the Sea Scouts were sincere regarding their openness to admitting atheists and gays into the Berkeley Sea Scouts.

On February 19, 1998, Defendants threatened that the Plaintiffs Berkeley Sea Scouts would be required to subscribe to a specifically worded pledge of fealty to Defendants' policies regarding gays and atheists or lose their continued free use of the Marina berths. Defendants required that this "loyalty oath" be made in writing via a "local policy statement" according to Defendants' specifically worded pledge or else, the Plaintiffs Berkeley Sea Scouts continued free use of the public facilities

at the Marina (which they had enjoyed for over 60 years) would be terminated. This violated the Plaintiffs' constitutional free speech rights by attempting to compel the Plaintiffs to adopt and speak Defendants' specified viewpoint on a controversial issue.

A governmental agency may not constitutionally refuse a public benefit (I.e. tax exemption, free berth) based upon a person's refusal to subscribe to a "loyalty oath" adopting the government's viewpoint. See **Speiser v. Randall** (1958) 357 U.S. 513; **Wieman v. Updegraff** (1952) 344 U.S. 183. This violates Plaintiffs' constitutional free speech rights. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government. **Perry v. Sindermann** (1972) 408 U.S. 593; **Dolan v. City of Tiaard** (1994) 512 U.S. 377, 385.

Furthermore, Defendants attempted to force the Plaintiffs Sea Scouts to state the Defendants' "loyalty oath" which directly conflicted with the national Boy Scouts of America policies to the national leadership of the Boy Scouts of America organization, and the local Mount Diablo Council of the Boy Scouts. This further violated the plaintiffs' free speech rights and free of association rights.

33. The procedure by which the City of Berkeley Waterfront Commission and the Berkeley City Council implemented the March 4, 1997, resolution (Resolution No. 58,859, N.S.) which permitted officials wide or unbounded discretion in granting or denying the Sea Scouts application for continued free use of the facilities of the Berkeley Marina was constitutionally infirm because it permitted officials to base their determination on the content of the ideas sought to be expressed.

34. On February 26, 1998, Jamie Wasson, Chairperson of the City of Berkeley Waterfront Commission, again threatened the Sea Scouts that City of Berkeley public officials required that the Plaintiffs Berkeley Sea Scouts subscribe to a specifically worded pledge of fealty to Defendants' policies regarding gays and atheists ("loyalty oath") and that such statement would have to be adopted and made known to each of the boys in the Berkeley Sea Scouts or else, the Plaintiffs Berkeley Sea Scouts continued free use of the Marina would be terminated. This violated the Plaintiffs' constitutional free speech rights by attempting to compel the Plaintiffs to adopt and speak Defendants' specified viewpoint on a controversial issue.

Furthermore, Defendants insisted that the "loyalty oath" statement by Plaintiffs regarding gays and atheists would also have to be made directly to the Boy Scouts national organization as well: imperiling, inter alia, Plaintiffs relationship with the Boy Scouts, as well as the liability insurance benefits and rights to continued use of the Northland boat obtained through the Boy Scouts. This violated Plaintiffs' rights of freedom of association.

36. On February 26, 1998, Defendants' public officials again, attempted to write the content of the demanded "loyalty oath" by the Plaintiffs Berkeley Sea Scouts; for example, they continued to demand that "The boys must know that they are not obligated to swear to the [Scout] oath, and that they are welcome regardless of their [sexual] orientation, religion, physical condition, marital status, etc." This violated Plaintiffs' rights of freedom of speech and association.

37. At all times mentioned herein, the policies of the national Boy Scouts of America ("BSA") organization are and have been beyond the control of the Plaintiffs Berkeley Sea Scouts. The Boy Scouts of America total approximately

5,000,000 persons. The Plaintiffs Berkeley Sea Scouts participants at issue here are comprised of only about 150 persons who are not involved in the administration of the national BSA organization. Unit level operations such as the Berkeley Sea Scouts simply cannot set or modify national Boy Scouts of America organization policies.

Indeed, at all times mentioned herein, the Defendants knew these facts, and yet chose to punish, penalize and deprive innocent children and adult volunteers (Plaintiffs Berkeley Sea Scouts) of their rights secured by the laws and the Constitutions of the United States and of the State of California, by depriving them of the continued free use of the facilities at the Berkeley Marina for associating with the Boy Scouts of America and for failing to adopt the City of Berkeley's approved message and to disapprove a disfavored one (national Boy Scouts of America policies regarding homosexuals and atheists) on issues beyond Plaintiffs control in order for Defendants to make a political statement of their own to the national Boy Scouts of America organization.

This violated Plaintiffs' rights of freedom of speech and association. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government. **Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.**, (1995) 515 U.S. 557, 579, 115 S. Ct. 2338, 2350.

40. On March 11, 1998, at a meeting of the Waterfront Commission, Ms. Jamie Wasson, Chair of the Waterfront Commission, again threatened that Defendants would terminate the Plaintiffs Sea Scouts historically free use of the facilities at the Berkeley Marina because of their association with the Boy Scouts of America. The Waterfront Commission continued the

matter until April, 1998, with the Commission directing the Sea Scouts to attempt to get a waiver of the national Boy Scouts of America policies regarding homosexuals and atheists from the Boy Scouts of America. This violated Plaintiffs' rights of freedom of speech and association.

41. It was made clear at that March 11, 1998, meeting and shortly thereafter by City of Berkeley public officials, that if the Plaintiffs Sea Scouts did not officially state the "loyalty oath" demanded by Defendants that directly challenged the Boy Scouts national policies, the Plaintiffs Berkeley Sea Scouts historically free use of Marina would be terminated and the Sea Scouts would face eviction from the Marina. This violated Plaintiffs' rights of freedom of speech and association.

42. It was also made clear at that March 11, 1998, meeting and shortly thereafter by Defendant City of Berkeley public officials, particularly Diane Woollen, Council member Kriss Worthington and Jamie Wasson, that the City of Berkeley intended to attempt to overturn the national policies of the national Boy Scouts of America organization relating to the admission of homosexuals and atheists by threatening and taking punitive actions against the Plaintiffs Berkeley Sea Scouts. Defendants attempted to use, threaten and penalize the innocent Plaintiffs as political pawns to pressure the national Boy Scouts of America organization to change its national policies on gays and atheists. This violated Plaintiffs' rights of freedom of speech and association.

43. Thereafter, the Berkeley Sea Scouts attempted to comply with the City of Berkeley's requirements by negotiating a resolution of the matter with the regional office of the Boys Scouts of America: the Mount Diablo Council of the Boy Scouts of America. The Berkeley Sea Scouts and the Mount Diablo Council reached agreement on and approved a local statement of policy designed to satisfy the City of Berkeley and

its public officials on the gay and atheist issues. It was embodied in a letter dated April 8, 1998, directed to Cliff Marchetti, Waterfront Manager, City of Berkeley. In that letter, Plaintiffs agreed to comply with Defendant's resolutions and ordinances prohibiting discrimination based upon sexual orientation or religious beliefs.

44. On April 8, 1998, the Berkeley Sea Scouts' letter of that same date was presented to the City of Berkeley Waterfront Commission. Upon motion, some of Defendants public officials voted to recommend that the Berkeley City Council no longer provide free berths to the Sea Scout vessels as long as the Sea Scouts are affiliated/associated with the Boys Scouts of America. The motion failed for a lack of majority. This action threatened Plaintiffs' rights of freedom of speech and association and equal protection of the laws.

45. Thereafter, at the April 8, 1998, meeting the Waterfront Commission found that the Plaintiffs Berkeley Sea Scouts provided a public service that was more valuable than the value of the berths rental fees. The Commission recommended that the Berkeley City Council approve the free berths at the Marina for one year for all Berkeley Sea Scout vessels, on condition that the Sea Scout letter dated April 8, 1998, be distributed to all Boy Scout members and persons associated with the Berkeley Sea Scout program and on the further condition that the Sea Scouts initiate a dialogue with the Mount Diablo Council of Boy Scouts on changing the national Boy Scouts of America organization's policies regarding gays and atheists. This interfered with and violated Plaintiffs' rights of freedom of speech and association and equal protection of the laws. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government. **Perry v. Sindermann** (1972)

408 U.S. 593; **Dolan v. City of Tigard** (1994) 512 U.S. 377, 385.

46. At that very same meeting of the City of Berkeley Waterfront Commission on April 8, 1998, the application by the Nautilus Institute for a free berth at the Berkeley Marina for the Pegasus vessel was approved without the imposition of any conditions. The Cal Sailing Club and the Berkeley Yacht Club also continue to receive free berths/dock space and use of the Berkeley Marina and they have not been subjected to the same requirements by the City of Berkeley that have been imposed upon the Berkeley Sea Scouts. This violated Plaintiffs' rights of equal protection and against unlawful discrimination under the laws.

47. On May 5, 1998, the Berkeley City Council considered the application of the Berkeley Sea Scouts for the continuation of their historic free use of the facilities of the Berkeley Marina. At that time, Defendants were made aware that the Plaintiffs Berkeley Sea Scouts had never unlawfully discriminated against one, single, solitary person in the more than 60 years the Sea Scouts had enjoyed the free use of the facilities in the Marina. Defendants were also made aware that Plaintiffs, via the April 8, 1998 letter had agreed not to discriminate against gays or atheists. Defendants were also aware that the California Supreme Court declared on March 23, 1998, in **Curran v. Mount Diablo Council of the Boy Scouts** (1998) 17 Cal.4th 670, that the Boy Scouts organization's policies of excluding gays and atheists was not unlawful discrimination under California law.

48. At the May 5, 1998, meeting, the Berkeley City Council was repeatedly made aware that the Council's proposed termination of the Plaintiffs Berkeley Sea Scouts' continued free use of boat berths and other facilities at the Berkeley Marina would not impact the national Boy Scouts of America

organization's policies regarding gays and atheists, but instead would only serve to injure and penalize those innocent boys, girls and adult volunteers who participate in the Berkeley Sea Scouts program and who had done absolutely nothing wrong. The City Council was further made aware that the Council's proposed action, which was being taken in efforts by the City of Berkeley to politically challenge the national policies of the Boy Scouts of America, would only serve to destroy a beneficial local program for teenagers that teaches them useful skills, teamwork and responsibility.

49. At the May 5, 1998, meeting, the Berkeley City Council was also made aware that in the 60+ years that the Berkeley Sea Scouts had operated their program out of the Berkeley Marina/Harbor the Berkeley Sea Scouts have NEVER once discriminated against any gay, atheist or anyone else. The Council was further made aware that there had NEVER been a single violation of any City of Berkeley ordinance or resolution by the Berkeley Sea Scouts; the Berkeley Sea Scouts were in complete compliance with all of the ordinances and laws of the City of Berkeley. The Council was further made aware that the Berkeley Sea Scouts is a very diverse group composed of many Hispanics, Asians, African-Americans, Caucasians as well as others; Girls also participated in the Berkeley Sea Scouts program.

50. At the May 5, 1998, meeting, the Berkeley City Council was also made aware that at least one atheist was at that time currently participating in the Berkeley Sea Scouts program-proving that the Berkeley Sea Scouts did not and do not discriminate.

51. At the May 5, 1998, meeting, the Berkeley City Council was made aware that the Berkeley Sea Scouts program offered a positive outlet for economically disadvantaged inner-

city youths and job-training while vocational programs in public schools were being cut back.

52. At the May 5, 1998, meeting, the Berkeley City Council was also made aware that a person can be a Berkeley Sea Scout and not personally agree with or ascribe to the gay/atheist policies of the national Boy Scouts organization; Plaintiffs pleaded not to be penalized for merely associating or affiliating with the national Boy Scouts of America organization.

53. At the May 5, 1998, meeting, the Berkeley City Council was made aware that many of the youths who participated in the Berkeley Sea Scouts do not have the financial means to participate in such activities outside of the Berkeley Sea Scouts program.

54. At the May 5, 1998, meeting, the Mayor of the City of Berkeley and Councilperson Shirley Dean admitted that the City of Berkeley knew that the Berkeley Sea Scouts could not afford to pay the Berkeley Marina berth fees required for the Berkeley Sea Scout boats if the historic free use of the berths were to be terminated by the City of Berkeley. In other words, they knew that a termination of the continued free usage of the Marina would result in the constructive eviction of the Plaintiffs Sea Scouts. This was the Defendants' plan all along.

55. At the, May 5, 1998, meeting, the Berkeley City Council was made aware that the Berkeley Sea Scout program helped troubled youths learn respect for themselves, superiors and helped to keep them out of trouble. The Council was further made aware that most of the kids in the Berkeley Sea Scout program came from low-income homes.

56. At the May 5, 1998, meeting, the Berkeley City Council made a statement applauding and commending the

Berkeley Sea Scouts' for their efforts to modify the national Boy Scouts of America organization policies regarding gays and atheists. Furthermore, the Council expressly acknowledged the enormous contributions to the community by Berkeley Sea Scout ship Skippers Peter Saugman, William Brazil and Gene Evans and many others.

57. At the May 5, 1998, meeting, Defendants' public officials made it quite clear that the City of Berkeley should deprive the local Plaintiffs Berkeley Sea Scouts of the historic free use of the Berkeley Marina in order to compel them to promote the City of Berkeley's approved message (of nondiscrimination against gays and atheists) and to discourage a disfavored message (the national policies of the Boy Scouts of America). Yet, such conduct is unlawful no matter how enlightened either purpose may strike the government. See **Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.** (1995) 515 U.S. 557, 579, 115 S.Ct. 2338, 2350. This violated Plaintiffs' rights of freedom of speech and association and equal protection of the laws.

59. At the May 5, 1998, meeting, Defendants public officials made it clear that the City of Berkeley was seeking to take action against the local Berkeley Sea Scouts to deny them the continued free use of berths at the Berkeley Marina in order to retaliate against the national Boy Scouts of America organization for having declined Timothy Curran's application to become a Scoutmaster some seventeen (17) years earlier in 1981-because Mr. Curran was a gay activist: not because the local Berkeley Sea Scouts had ever done anything wrong.

60. At the May 5, 1998, meeting, Berkeley City Councilperson Betty Olds, speaking from personal experience, acknowledged that as long as there has been Scouting in Berkeley, there have been gays and atheists in all of the Scout

troops in Berkeley, and no one has ever been kicked out for being an atheist or gay.

61. At the May 5, 1998, meeting, Berkeley City officials acknowledged that the Berkeley Sea Scout program is a wonderful program, that the people who run the program were not discriminatory, and that the Sea Scout program is a hugely successful and beneficial program to the community.

62. At the May 5, 1998, meeting, Defendants voted to deny the Plaintiffs Berkeley Sea Scouts the continued free use of the facilities of the Berkeley Marina. This violated Plaintiffs' rights to freedom of speech and association and equal protection under the laws.

63. On or about May 21, 1998, City of Berkeley Waterfront Manager, Cliff Marchetti wrote a letter to the Berkeley Sea Scouts and the Mount Diablo Council of the Boy Scouts of America. That letter repudiated and breached the agreements in effect for over 60 years (oral/written/implied contract/estoppel/lease) referred to above between the City of Berkeley, the Boy Scouts and the Plaintiffs Berkeley Sea Scouts, which granted the Sea Scouts the continued free use of the facilities of the Berkeley Marina, breached the implied covenants of good faith and fair dealing made part of such agreements (oral/written/implied contract/estoppel/lease), and breached the implied covenant of quiet enjoyment made part of the agreements (oral/written/implied contract/estoppel/lease). The reason stated for taking such action was that the Plaintiffs Berkeley Sea Scouts were associated with the national Boy Scouts of America organization which has a national policy of discriminating based on sexual orientation and atheism. The letter stated that the Berkeley City Council had denied the continued free use of the facilities of the Berkeley Marina on that basis alone. This violated Plaintiffs' rights to freedom of speech and association and equal protection under the laws.

64. The May 21, 1998, letter of Waterfront Manager, Cliff Marchetti, further threatened that if the Berkeley Sea Scout boats/ships were not removed within 30 days of the date of that letter, they would be assessed a higher rate of rent than an ordinary monthly berth renter and that other action (eviction) may be taken against them.

65. The May 21, 1998, letter of Waterfront Manager, Cliff Marchetti, did not comply with the requirements of the 1969 City Council Resolution No. 42,885 (written/implied contract/lease) which required that any revocation of that Resolution must be made by written notice given by the City Manager-not the Waterfront Manager. Consequently, no legally effective revocation of the Sea Scout's "permit" granted by City Council Resolution No. 42,885 has occurred to date. A boat berth in a marina is "real property" for the purpose of unlawful detainer statutes and strict compliance with unlawful detainer statutes is required.

66. The actions of the City of Berkeley its agencies and agents, while penalizing innocent children and innocent adult volunteers, has done absolutely nothing for gays or atheists. Defendants actions have done precisely nothing to eliminate discrimination, because there has not been any. Defendants' actions have had absolutely no effect on the national policies of the Boy Scouts, of America. Defendants' actions were not narrowly tailored to achieve a compelling governmental interest.

67. Additionally, "good cause" was required to revoke the "permit" (written/implied contract/lease) between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, in order to cause a forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts. Based on the foregoing facts, no such "good cause" for revocation and forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts in the free use of the

facilities of the Berkeley Marina which they had enjoyed for a period of over sixty (60) years either exists or has been shown. The law abhors a forfeiture.

69. The City of Berkeley, its agents, officials and representatives' attempt to revoke/deprive the rights of the Boy Scouts and Plaintiffs Berkeley Sea Scouts in the free use of the facilities of the Berkeley Marina without good cause was unlawful and was made in bad faith. It attempted to deprive the Boy Scouts and Berkeley Sea Scouts of the benefits of their earlier agreements (oral/written/implied contract/estoppel/lease) and their rights under the First Amendment of freedom of speech and association.

The United States Supreme Court has appositely decreed that

> For at least a quarter-century, this Court has made clear that, even though a person has no "right" to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech. **For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited**. This would allow the government to produce a result which it could not command directly. [Citation] Such interference with constitutional rights is impermissible.

Perry v. Sindermann (1972) 408 U.S. 593, 597.

70. At all times mentioned herein, the City of Berkeley, the Waterfront Commission, the City Council, and the agents, officials and representatives of the City of Berkeley knew that the Berkeley Sea Scouts would not be able to continue to pay the sums of money demanded of them to be paid by the City of Berkeley for the rental of the berth spaces they occupied at the Berkeley Marina. They also knew that the membership of the Berkeley Sea Scouts was made up of many economically disadvantaged youths who paid only seven dollars ($7) in annual membership to participate in the Berkeley Sea Scouts program together with unpaid adult volunteers, and that some of the youth participants could not even afford the $7 per year fees.

The City of Berkeley, the Waterfront Commission, and the agents, officials and representatives of the City of Berkeley also knew that the Berkeley Sea Scouts receive no funding from the regional Mount Diablo Council of the Boy Scouts of America nor the national Boy Scouts of America organization. Consequently, the City of Berkeley, the Waterfront Commission, and the agents, officials and representatives of the City of Berkeley knew that by denying the historically free use of the facilities to the Berkeley Sea Scouts and charging them rent for the use of such facilities, this would result in the constructive eviction of the Berkeley Sea Scouts from the Berkeley Marina because they knew the Berkeley Sea Scouts could not afford to continue to pay such rents.

In fact, the Berkeley Sea Scouts ship Northland and other Sea Scout boats were forced to re-locate to berths and facilities in another city because of this fact. Moreover, the Berkeley Sea Scouts ship Farallon has gone from being a free berth user to paying more money each month in berth rentals than most, if not all, of the other berth renters at the Berkeley Marina—which the Berkeley Sea Scouts cannot afford to continue to pay.

71. The foregoing described conduct on the part of the City of Berkeley, the Berkeley City Council, the City of Berkeley Waterfront Commission, Mr. Cliff Marchetti, Ms. Jamie Wasson, Ms. Diane Woollen, and some other presently unidentified City of Berkeley public officials, agents or representatives unlawfully deprived/denied/infringed the Berkeley Sea Scouts (youth participants and adult volunteers) Federal Constitutional and State Constitutional rights to due process of law [14th Amendment; Cal. Const. Art. I, section 7], freedom of speech [First Amendment; Cal. Const. Art. I, section 2], freedom of association [First Amendment; Cal. Const., California law], impairment of the obligation, of contracts [U.S. Constitution, Art. I, section 10, clause 1], and equal protection of the laws [14th Amendment, Cal. Const. Art. I, section 7], violated 42 U.S.C. section 1983 [deprivation of rights under color of state law], violated Civil Code section 51 (Discrimination in equal accommodations of facilities—affiliation with Boy Scouts of America), Civil Code section 52, (Denial of civil rights or discrimination-penalties, damages), Civil Code section 52.1 (Threats, intimidation, coercion or other interference with any rights provided by the Federal or State Constitutions or laws), Civil Code section 1714(a) (Negligence and duty of care), Government Code section 814, et seq. (breach of contract) Government Code section 815.2 (government entity respondeat superior liability for all tortious acts and omissions of employees within the scope of employment), Government Code section 815.6 (failure to execute mandatory duty), Government Code section 12948 (Denial of civil rights as unlawful), and violated the City of Berkeley's own March 4, 1997 resolution (Resolution No. 58,859, N.S. availability and use of the Berkeley Marina facilities not to be predicated on a person's political affiliation [association with Boy Scouts of America]) and breached the agreements (oral/written/implied contract/estoppel/lease) between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, providing for the continued free use of the facilities of

the Berkeley Marina by the Sea Scouts, breached the implied covenants of good faith and fair dealing made part of such agreements (oral/written/implied contract/estoppel/lease), breached the implied covenant of quiet enjoyment made part of the agreements (oral/written/implied contract/estoppel/lease), and constituted a constructive eviction of the Berkeley Sea Scouts, violated California Constitution, Article I, section 19 (private property rights may not be taken, invaded or damaged without just compensation being made to the property owner/possessor/user), and violated and/or deprived the Berkeley Sea Scouts of other rights, privileges or immunities of the Berkeley Sea Scouts secured by the Constitutions or laws of the United States or the State of California.

FIRST CAUSE OF ACTION

[Breach of Contract in Writing,
Implied Covenant of Quiet Enjoyment]

As for the FIRST CAUSE OF ACTION, Plaintiffs allege against defendants CITY OF BERKELEY, CITY OF BERKELEY-CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, and each of them as follows:

72. Plaintiffs reallege all of the paragraphs of the PRELIMINARY STATEMENT of this Complaint as though fully set forth at this point.

73. In 1969, the City of Berkeley, via City Council Resolution, (Resolution No. 42,885, N.S.) agreed in writing to provide the Boy Scouts, for use by the Berkeley Sea Scouts, the use of six boat berths, two dry storage spaces and one dock locker without charge at the Berkeley Marina. The Boy Scouts and Sea Scouts were to comply with all rules and regulations applicable to the Berkeley Marina and the free use of the facilities was made revocable on 30 days written notice by the

City Manager. The Boy Scouts agreed to be bound by the terms of that Resolution (written/implied contract/lease).

74. That Resolution agreement (written contract/implied contract/lease) with the City of Berkeley was made for the express benefit of the Berkeley Sea Scouts and adult volunteers then participating in the Berkeley Sea Scouts program, as well as for the benefit of all future Berkeley Sea Scouts and all adult volunteers who would participate in the Berkeley Sea Scouts program in the future.

75. Plaintiffs and the Boy Scouts of America have fully performed all conditions, covenants, and promises required of them under the agreements (oral/written/implied contract/estoppel/lease).

75.1 The 1969 resolution (Resolution No. 42,885. N.S.) is a contract that does not conflict with the Defendant City of Berkeley's "Charter" section proffered by defendants that the contract be (1) in writing, (2) executed in the name of the city by an officer or officers authorized to sign same and (3) be countersigned by the Auditor who shall number and register it in a book have all been substantially met here. See **Milovich v. City of Los Angeles** (1941) 42 Cal. App. 2d 364, 371-372.

The 1969 resolution is (1) in writing, (2) signed by an Assistant City Attorney, signed in the name of the City by the Mayor and President of the Berkeley City Council, and it is also signed by the City Clerk and Clerk of the City Council on behalf of the entire City Council. (3) There is no evidence that in 1945 or in 1969 the Auditor was required to countersign the contract. In any event, the Auditors' ministerial duties of signing and numbering it (it is numbered as Resolution No. 42,885) and placing it in a book have been fulfilled by the City Clerk in this instance (City Council Minutes).

Additionally, Plaintiffs are informed and believe that the 1969 resolution is enforceable in any event under the provisions of the Defendant City of Berkeley's Charter sections 67.2, Charter Article IX regarding the powers of the City and City Council (in effect in 1969 but repealed in 1974). Charter sections 110, 111, and 116 (in effect in 1969 but repealed in 1974), Charter section 118.

76. On or about May 21, 1998, City of Berkeley Waterfront Manager, Cliff Marchetti wrote a letter to the Berkeley Sea Scouts and the Mount Diablo Council of the Boy Scouts of America. That letter repudiated and breached the agreements (written/implied contract/lease) referred to above between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, stating that the City of Berkeley would no longer honor the terms of the agreements (written/implied contract/lease) which historically granted the Sea Scouts the free use of the facilities of the Berkeley Marina. That letter breached the implied covenant of good faith and fair dealing made part of such agreements (written/implied contract/lease) and breached the implied covenant of quiet enjoyment made part of the agreements (written/implied contract/lease). The reason stated for the breaches was that the Berkeley Sea Scouts are associated with the national Boy Scouts of America organization which has a national policy of discriminating based on sexual orientation and atheism. The letter stated that the Berkeley City Council had denied the continued free use of the facilities of the Berkeley Marina on that basis alone.

77. "Good cause" was required to revoke the agreements (oral/written/implied contract/lease) between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, in order to cause a forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts. Based on the foregoing facts and the law, no such "good cause" for revocation and forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts in the free use of the

facilities of the Berkeley Marina which they had enjoyed for a period of over sixty (60) years either exists or has been shown. The law abhors a forfeiture.

78. At the time of the May 21, 1998, letter, the City of Berkeley and Berkeley City Council knew that the Berkeley Sea Scouts could not afford to pay the Berkeley Marina berth fees which would be required for the Sea Scout boats if the historic free use of the berths was terminated. Thus, the repudiation of the agreement (written contract/implied contract/lease) and unilateral termination of the historic free use of the Berkeley Marina facilities constituted a constructive eviction of the Plaintiffs and the Berkeley Sea Scouts.

79. As a result of Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, breach of the alleged agreements, Plaintiffs have suffered the following damages:

The reasonable rental value, in a sum according to proof at trial, for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc., including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520, 0-601, 0-813, 0-815, and Y002.

Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases and adjustments for inflation, etc. in a sum according to proof at trial.

General and compensatory damages; including without limitation, telephone expenses, photocopying expenses, and other out-of-pocket losses in a sum according to proof at trial.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

SECOND CAUSE OF ACTION
[Breach of Oral/Implied Contract]

As for the SECOND CAUSE OF ACTION, Plaintiffs allege against defendants CITY OF BERKELEY, CITY OF BERKELEY-CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, and each of them as follows:

80. Plaintiffs reallege all of the paragraphs of the PRELIMINARY STATEMENT of this Complaint as well as all of the paragraphs of the FIRST CAUSE OF ACTION as though fully set forth at this point.

81. In or around 1936 or 1937 the Mount Diablo Council of the Boy Scouts of America ("Boy Scouts") reached an agreement (oral/implied contract) with the City of Berkeley, whereby the Boy Scouts permitted the City of Berkeley to quarry and remove 40,000 tons of rock and fill from the hills of Camp Berkeley (owned by the Boy Scouts of America) during the year 1937 for use in the construction of the Berkeley Marina and the sea wall breakwater for the Berkeley Marina which was being constructed during that time. In exchange, the City of Berkeley was to provide permanent free mooring and berthing rights for the boats/ships of the Berkeley Sea Scouts in the Berkeley Yacht Harbor/Marina.

82. The agreement (oral/implied contract) with the City of Berkeley was made for the express benefit of the Berkeley Sea Scouts and adult volunteers then participating in the

Berkeley Sea Scouts program, as well as for the benefit of all future Berkeley Sea Scouts and all adult volunteers who would participate in the Berkeley Sea Scouts program in the future.

83. The rock and fill which the Boys Scouts permitted to be removed from Camp Berkeley pursuant to the agreement (oral/implied contract) was worth approximately $0.25-$0.50 per ton in 1937. At that price, the 40,000 tons of rock and fill provided by the Boy Scouts on behalf of the Sea Scouts to the City of Berkeley would have cost between ten and twenty thousand dollars ($10,000-$20,000) in 1937. In 1937, berth rental at the Marina for boats over 35 feet was only five dollars ($5) per month.

84. In furtherance of that agreement (oral/implied contract) with the City of Berkeley, the Boy Scouts continued to permit the City of Berkeley without any charge to remove an additional 40,000 tons of rock and fill from Camp Berkeley (to become known as Camp Herms in 1939) during the years 1938-1942 for use in the construction of the road around Berkeley's Aquatic Park, which was also being constructed during that period of time.

85. The rock and fill which the Boys Scouts permitted to be removed from Camp Berkeley in 1938-1939 was worth between $0.25 and $0.82 per ton. At that price, the second 40,000 tons of rock and fill would have cost between ten thousand dollars ($10,000.00) and thirty two thousand eight hundred dollars ($32,800.00) during those years. In 1937, berth rental at the Marina for boats over 35 feet was only seven dollars and fifty cents ($7.50) per month.

86. A variety of Berkeley City Council resolutions were enacted relating to the above described (oral/implied contract) arrangements between the City of Berkeley, Boy Scouts and the Sea Scouts.

87. In 1945, the City of Berkeley confirmed, via City Council Resolution, (Resolution No. 27,738, N.S.) that the Boy Scouts and Sea Scouts had been granted the use of berth and mooring facilities in the Berkeley Yacht Harbor without charge. The Boy Scouts and Sea Scouts were to comply with all rules and regulations applicable to the Berkeley Yacht Harbor and the free use of the facilities was made revocable on 30 days written notice. A copy of that Resolution is attached as Exhibit C and incorporated by this reference.

88. Plaintiffs and the Boy Scouts of America have fully performed all conditions, covenants, and promises required of them under the agreements (oral/implied contract).

89. From 1937 to May 21, 1998, the Defendants honored the terms of that oral/implied contract through a sixty (60) years course of conduct and the Berkeley Sea Scouts and their adult volunteers enjoyed berth and mooring facilities in the Berkeley Yacht Harbor without charge or incident.

90. Plaintiffs are informed and believe that an oral/implied contract is enforceable against Defendants under the provisions of the Defendant City of Berkeley's Charter sections 67.2, Charter Article IX regarding the powers of the City and City Council (in effect in 1969 but repealed in 1974), Charter sections 110, 111, and 116 (in effect in 1969 but repealed in 1974), Charter section 118.

91. On or about May 21, 1998, City of Berkeley Waterfront Manager, Cliff Marchetti wrote a letter to the Berkeley Sea Scouts and the Mount Diablo Council of the Boy Scouts of America. That letter repudiated and breached the agreements (Oral/implied contract) referred to above between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, stating that the City of Berkeley would no longer honor the terms of the agreements (Oral/implied contract) which

historically granted the Sea Scouts the free use of the facilities of the Berkeley Marina. That letter also breached the implied covenant of good faith and fair dealing made part of such agreements (Oral/implied contract). The reason stated for the breaches was that the Berkeley Sea Scouts are associated with the national Boy Scouts of America organization which has a national policy of discriminating based on sexual orientation and atheism. The letter stated that the Berkeley City Council had denied the continued free use of the facilities of the Berkeley Marina on that basis alone.

92. "Good cause" was required to revoke the agreements (oral/implied contract) between the City of Berkeley, the Boy Scouts and Berkeley Sea Scouts, in order to cause a forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts. Based on the foregoing facts and the law, no such "good cause" for revocation and forfeiture of the rights of the Boy Scouts and Berkeley Sea Scouts in the free use of the facilities of the Berkeley Marina which they had enjoyed for a period of over sixty (60) years either exists or has been shown. The law abhors a forfeiture.

93. At the time of the May 21, 1998, letter, the City of Berkeley and Berkeley City Council knew that the Berkeley Sea Scouts could not afford to pay the Berkeley Marina berth fees which would be required for the Sea Scout boats if the historic free use of the berths was terminated. Thus, the repudiation of the agreements (oral contract/implied contract) and unilateral termination of the historic free use of the Berkeley Marina facilities constituted a constructive eviction of the Plaintiffs and the Berkeley Sea Scouts.

94. As a result of Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL. CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1

through 20, inclusive, breach of the alleged agreements, Plaintiffs have suffered the following damages:

The reasonable rental value, in a sum according to proof at trial, for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc.. Including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520, 0-601, 0-813, 0-81 5, and Y002.

Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases and adjustments for inflation, etc. in a sum according to proof at trial.

General and compensatory damages, including without limitation, telephone expenses, photocopying expenses, and other out-of-pocket losses in a sum according to proof at trial.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

THIRD CAUSE OF ACTION
[Estoppel]

As for the THIRD CAUSE OF ACTION, Plaintiffs allege against defendants CITY OF BERKELEY, CITY OF BERKELEY-CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, and each of them as follows:

95. Plaintiffs reallege all of the paragraphs of the PRELIMINARY STATEMENT of this Complaint, all of the

paragraphs of the FIRST CAUSE OF ACTION, and all of the paragraphs of the SECOND CAUSE OF ACTION as though fully set forth at this point.

96. Defendants by making oral representations/ assurances that the Boys Scouts and Berkeley Sea Scouts would continue to enjoy boat berths, mooring privileges, and other facilities at the Berkeley Marina free of charge managed to obtain tens of thousands of tons of rock and fill worth tens of thousands of dollars from the Boys Scouts and used such rock/fill to create the breakwater for the Berkeley Marina and the roadway for Berkeley's Aquatic Park free of charge.

Additionally, Defendants by making oral representations/ assurances that the Boys Scouts and Berkeley Sea Scouts would continue to enjoy boat berths, mooring privileges, and other facilities at the Berkeley Marina free of charge managed to obtain valuable community service from Plaintiffs Berkeley Sea Scouts free of charge which provided the following services including, without limitation, community outreach programs directed to economically disadvantaged "inner city" youths who would otherwise have no opportunity to be involved in vocational or maritime training, youth training in pipe-fitting, marine engine repair, electrical repair, wood working, large boat handling, small boat handling, navigation, rescue operations, sailing, carpentry, painting, sewing, metal working, fiber glassing, working together as a part of a team with other shipmates, and generally helping to develop skills for a future in a maritime career which services greatly exceeded the rental value of the berths provided.

Such oral representations/assurances by said defendants created a reasonable reliance and belief in the Boys Scouts and Berkeley Sea Scouts that they would continue to enjoy boat berths, mooring privileges, and other facilities at the Berkeley Marina free of charge in perpetuity. It would now be

unconscionable for said defendants to deny that the Boys Scouts and Berkeley Sea Scouts shall continue to enjoy boat berths, mooring privileges, and other facilities at the Berkeley Marina free of charge in perpetuity.

97. Injustice can only be avoided by enforcing such representations/assurances of defendants CITY OF BERKELEY, CITY OF BERKELEY-CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive ,and by estopping said defendants from denying same.

98. As a result of Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY-WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, failure to perform according to their representations/assurances, Plaintiffs have suffered the following damages:

The reasonable rental value, in a sum according to proof at trial, for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc.. Including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520, 0-601, 0-813, 0-815, and Y002.

Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases, adjustments for inflation, etc. in a sum according to proof at trial.

General and compensatory damages, including without limitation, telephone expenses, photocopying expenses, and other out-of-pocket losses in a sum according to proof at trial.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

FOURTH CAUSE OF ACTION

[Violations of Unruh Act and Berkeley Municipal Code/Resolution]

As for the FOURTH CAUSE OF ACTION, Plaintiffs allege against defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, and each of them as follows:

99. Plaintiffs reallege all of the paragraphs of the PRELIMINARY STATEMENT of this Complaint, all of the paragraphs of the FIRST CAUSE OF ACTION, all of the paragraphs of the SECOND CAUSE OF ACTION, and all of the paragraphs of the THIRD CAUSE OF ACTION as though fully set forth at this point.

100. At all times mention herein, Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, and CITY OF BERKELEY WATERFRONT COMMISSION, owned, operated, administered and controlled the Berkeley Marina as a business establishment within the meaning of the Unruh Act. The Berkeley Marina is a business establishment and place of public accommodation located in Berkeley, Alameda County, California, that is engaged in the business of providing boat berths, dry storage facilities for boats, and other business and services.

101. Plaintiffs are all participants in the Berkeley Sea Scout program. The Sea Scouts are a subdivision of the national Boy Scouts of America organization.

102. Because Defendants vehemently disagreed with the national Boy Scouts of America organization viewpoints and policies of excluding gays and atheists from the Boy Scouts of America organization, Defendants decided to arbitrarily and unlawfully punish and intentionally discriminate against the completely innocent children and community volunteer Plaintiffs BERKELEY SEA SCOUTS by deliberately targeting them in efforts to run them out of town because of their affiliation/association with the Boy Scouts of America organization. On March 4, 1997, Defendants used the vehicle of a City Council resolution (Resolution No. 58,859, N.S.) to attempt to run the Plaintiffs BERKELEY SEA SCOUTS out of the Berkeley Marina.

That Resolution provided, inter alia, that the availability and use of the facilities of the Berkeley Marina would not be predicated on a person's religious (atheism) or sexual orientation (gays). That Resolution applied to the free use of berth space in the Berkeley Marina and to no other area of the City. That Resolution (Resolution No. 58,859, N.S.) applied to only the Berkeley Sea Scouts and to no other group. At the time, the Berkeley Sea Scouts was the only group receiving free berth space in the Marina.

Defendants efforts to run the BERKELEY SEA SCOUTS out of the Berkeley Marina because of their association with the Boy Scouts were somewhat successful. The BERKELEY SEA SCOUT ship Northland was forced to leave the Berkeley Marina, because they could not afford to pay the demanded berth fees—a fact well known to the Defendants at the time. This violated the Berkeley Sea Scouts rights to freedom of association and equal protection of the laws and denied

Plaintiffs the full and equal accommodations, advantages, facilities, privileges and services of the Berkeley Marina. No other free berth applicant at the Berkeley Marina was deliberately and specifically singled out and targeted by Defendants in efforts to run them out of town because of their political affiliation with an organization that the Defendants disliked.

Defendants intentionally targeted Plaintiffs for punishment (denial of continued free berths) because of their association with the Boy Scouts despite the fact that Plaintiffs had disavowed the national policies of the Boy Scouts that Defendants' disagreed with, had agreed in writing to obey the Defendants' resolution and ordinances that prohibited discrimination by Plaintiffs based on sexual orientation and religious belief, that an atheist was a member of the Plaintiffs Sea Scouts, that the defendants knew they did not discriminate and were sincere in their openness to admitting gays and atheists, and despite the fact that Defendants knew that gays had always been a part of every scout troop in Berkeley including the Berkeley Sea Scouts, and despite the fact that Plaintiffs Berkeley Sea Scouts had never discriminated against anyone. Defendants conduct penalizing Plaintiffs for their association with the Boy Scouts constituted arbitrary and unlawful discrimination.

The United States Supreme Court has consistently disapproved governmental action denying rights and privileges solely because of a citizen's association with an unpopular organization. Guilt by association alone, without establishing that an individual's association poses the threat feared by the government, is an impermissible basis on which to deny First Amendment rights. **Healy v. James** (1972) 408 U.S. 169, 185-186 [Denial of free use of public facilities based on plaintiffs' association with unpopular organization held unconstitutional violation of freedom of association].

The Due Process Clause does not permit a state, in attempting to bar state benefits to a person on the basis of organizational membership to arbitrarily classify innocent persons with others in the organization who have committed unlawful acts. Such a classification is patently arbitrary and discriminatory. **Wieman v. Updegraff** (1952) 344 U.S. 183, 190-193.

A governmental agency may not constitutionally refuse a public benefit (I.e. tax exemption, free berth) based upon a person's refusal to subscribe to a "loyalty oath" adopting the government's viewpoint. See **Speiser v. Randall** (1958) 357 U.S. 513; **Wieman v. Updegraff** (1952) 344 U.S. 183. This violates Plaintiffs' constitutional free speech rights. Under the well settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government. **Perry v. Sindermann** (1972) 408 U.S. 593; **Dolan v. City of Tigard** (1994) 512 U.S. 377, 385.

Furthermore, Defendants further arbitrarily and unlawfully discriminated against Plaintiffs by attempting to force the Plaintiffs Sea Scouts to state the Defendants' "loyalty oath" which directly conflicted with the national Boy Scouts of America policies to the national leadership of the Boy Scouts of America organization, and the local Mount Diablo Council of the Boy Scouts: imperiling, inter alia, Plaintiffs relationship with the Boy Scouts, as well as the liability insurance benefits and rights to continued use of the Northland boat obtained through the Boy Scouts. This further violated the plaintiffs' free speech rights and free of association rights and was unlawful discrimination to which other free berth applicants were not subjected.

103. This conduct by Defendants violated Civil Code section 51 and section 52 (discriminating, denying, aiding in the

denial and/or inciting the denial of privileges, use of facilities, etc. This also violated Civil Code section 52.1 (Interference by threats, intimidation or coercion with the Plaintiffs' exercise or enjoyment of State and Federal Constitutional rights of free speech, freedom of association, and equal protection of the laws). This also violated City of Berkeley Resolution No. 58,859, N.S. (Availability and use of the Berkeley Marina facilities shall not be predicated on a person's political affiliation).

No other applicant for the free use of the facilities of the Berkeley Marina, aside from the Berkeley Sea Scouts was subjected to such treatment as a condition of receiving free use of the facilities of the Berkeley Marina.

104. On April 8, 1998, the City of Berkeley Waterfront Commission arbitrarily and unlawfully required that the Plaintiffs Berkeley Sea Scouts be permitted to have free berths at the Berkeley Marina for one year on condition that the Sea Scout letter dated April 8, 1998, be distributed to all Boy Scout members and persons associated with the Berkeley Sea Scout program and on the further condition that the Sea Scouts initiate a dialogue with the Mount Diablo Council of Boy Scouts on changing the national Boy Scouts of America organization's policies regarding gays and atheists. No other free berth applicant was required as a condition to receiving a free berth to confront an organization it was associated with and attempt to change its national policies because Defendant did not like its policies. This violated Civil Code section 51 and section 52 (discriminating, denying, aiding in the denial, and/or inciting the denial of privileges, use of facilities, etc. by the Plaintiffs-Berkeley Sea Scouts). This also violated Civil Code section 52.1 (Interference by threats, intimidation or coercion with the Plaintiffs' exercise or enjoyment of State and Federal Constitutional rights of free speech, freedom of association, and equal protection of the laws).

105. At that very same meeting of the City of Berkeley Waterfront Commission on April 8, 1998, the application by the Nautilus Institute for a free berth at the Berkeley Marina for the Pegasus vessel was approved without the imposition of any conditions.

108. On May 5, 1998, the City of Berkeley City Council arbitrarily and unlawfully denied the continuation of the Berkeley Sea Scouts historic free use of the facilities of the Berkeley Marina because the Berkeley Sea Scouts were politically affiliated/associated with the national Boy Scouts of America organization whose national policies were offensive to the City of Berkeley. This violated Civil Code section 51 and section 52 (discriminating, denying, aiding in the denial, and/or inciting the denial of privileges, use of facilities, etc. by the Plaintiffs-Berkeley Sea Scouts). This also violated Civil Code section 52.1 (Interference by threats. intimidation or coercion with the Plaintiffs' exercise or enjoyment of State and Federal Constitutional rights of free speech, freedom of association, and equal protection of the laws).

110. Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, wrongful conduct is continuing in that defendants continue to deny Plaintiffs-Berkeley Sea Scouts the historically free use of the Berkeley Marina by the Berkeley Sea Scouts as well as the full and equal accommodations, advantages, facilities, privileges of the Berkeley Marina as others.

111. As a proximate result of the conduct of Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, as alleged herein, Plaintiffs have suffered the following damages:

The reasonable rental value according to proof at trial for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc.. Including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520, 0-601, 0-813, 0-81 5, and Y -002.

Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases, adjustments for inflation, etc.

General and compensatory damages, including without limitation, lost wages, telephone expenses, photocopying expenses, and other out-of-pocket losses, cancellation of various Sea Scouting activities due to loss of funds, general impairment of Sea Scouting activities due to loss of funds, loss of members in Berkeley Sea Scouts because certain members could no longer afford to participate in the program due to the financial impact of the City of Berkeley's actions, etc. in a sum according to proof at trial.

Emotional distress and suffering, including without limitation, nervousness, grief, anxiety, worry, sense of powerlessness, feeling of oppression, sense of helplessness, mortification, shock, humiliation, shame, indignity, impairment of reputation, embarrassment, apprehension, fear and ordeal in a sum according to proof at trial.

Reasonable attorney fees incurred to date and as incurred in the future.

Civil statutory damages permitted by law under Civil Code section 52 ($1,000) and Berkeley Municipal, Code section 13.28.080 ($200$400) for each violation and for each Plaintiff.

WHEREFORE, Plaintiffs pray judgment as hereinafter set forth.

FIFTH CAUSE OF ACTION

[Violation of Constitutional Rights-Civil Code § 52.1; Deprivation of Rights Under Color of State Law-42 U.S.C. §§ 1983, 1988]

As for the FIFTH CAUSE OF ACTION, Plaintiffs allege against defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL. CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, ("Defendants") and each of them as follows:

112. Plaintiffs reallege all of the paragraphs of the PRELIMINARY STATEMENT of this Complaint, all of the paragraphs of the FIRST CAUSE OF ACTION, all of the paragraphs of the SECOND CAUSE OF ACTION, all of the paragraphs of the THIRD CAUSE OF ACTION and all of the paragraphs of the FOURTH CAUSE OF ACTION as though fully set forth at this point.

113. At all times herein mentioned, Plaintiffs, and each of them, were and are now citizens or persons within the jurisdiction of the United States of America.

113.10. Lack of a contractual right does not defeat a claim that the breach of a "contract" violated Plaintiffs' free speech rights under the First and Fourteenth Amendments. **Perry v. Sindermann** (1972) 408 U.S. 593, 597, 601-602.

114. As alleged above, Defendants' have interfered by threats, intimidation, or coercion, or attempted to interfere by threats, intimidation, coercion, with the exercise or enjoyment by Plaintiffs of their rights secured by the Constitution or laws of the United States or Constitution or laws of the State of California and have deprived Plaintiffs of their rights secured by the Constitution or laws of the United States under color of law as follows:

A. Defendants violated/deprived Plaintiffs of their rights to Due Process by taking from Plaintiffs the right to their free use of the facilities at the Berkeley Marina erroneously presuming, without holding a due process hearing on the matter, that the Berkeley Sea Scouts have been guilty of unlawful discrimination.

B. Defendants violated/deprived Plaintiffs of their rights to Due Process by approving a classification that aids persons perceived as members of relatively victimized groups (i.e., gays and atheists) at the expense of other innocent individuals (i.e., Sea Scouts) in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.

C. Defendants violated/deprived Plaintiffs of their rights to Due Process and freedom of speech by the procedure by which the City of Berkeley Waterfront Commission and the Berkeley City Council implemented the March 4, 1997, resolution (Resolution No. 58,859, N.S.) which permitted officials wide or unbounded discretion in granting or denying the Sea Scouts application for continued free use of the facilities of the Berkeley Marina because it permitted officials to base their determination on the content of the ideas sought to be expressed.

D. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and equal protection of the laws by

attempting to coerce and compel Plaintiffs to state a message favored by Defendants (local policy statement).

E. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by attempting to coerce and compel Plaintiffs to adopt a statement which directly conflicted with and challenged the national Boy Scouts of America policies regarding homosexuals and atheists.

F. Defendants violated/deprived Plaintiffs of their rights to freedom of speech, and association and equal protection of the laws by attempting to coerce and compel Plaintiffs to state their disapproval of a message disfavored by Defendants (national Boy Scouts of America policies regarding the admissions of homosexuals and atheists).

G. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by attempting to coerce and compel Plaintiffs to attempt to change the policies relating to gays and atheists held by the national Boy Scouts of America organization which are disfavored by Defendants.

H. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by attempting to coerce and compel Plaintiffs to sever their affiliation/association with the Boys Scouts of America.

I. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by attempting to coerce and compel Plaintiffs to distribute a letter to all Boy Scout members and persons associated with the Berkeley Sea Scout program and to initiate a dialogue with the Mount Diablo Council of Boy Scouts on

changing the national Boy Scouts of America organization's policies regarding gays and atheists.

J. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by unilaterally terminating the agreements/arrangements whereby Plaintiffs-Berkeley Sea Scouts had historically used the facilities of the Berkeley Marina free of charge due to Plaintiffs' association/affiliation with the national Boy Scouts of America organization.

K. Defendants violated/deprived Plaintiffs of their rights by terminating the agreements/arrangements whereby Plaintiffs-Berkeley Sea Scouts had historically used the facilities of the Berkeley Marina free of charge via passing resolutions, ordinances and/or laws which impaired the Defendants' obligations under such agreements/arrangements.

L. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by attempting to interfere with the internal structure and/or affairs of the Berkeley Sea Scouts and by attempting to write the policies of the Berkeley Sea Scouts program.

M. Defendants violated/deprived Plaintiffs of their rights to freedom of speech and association and equal protection of the laws by discriminating against Plaintiffs-Berkeley Sea Scouts and depriving them of their historic free use of the Berkeley Marina facilities because of their association/affiliation with the Boys Scouts of America while permitting other applicants free berth spaces at the Berkeley Marina (i.e., the Cal Sailing Club, the Berkeley Yacht Club and the Nautilus Institute/Pegasus vessel.) Each of these other groups have continued to enjoy the free use of the facilities of the Berkeley Marina without charge except for the Berkeley Sea

Scouts. This is due to the Berkeley Sea Scouts' association with the Boy Scouts of America.

115. As a proximate result of the conduct of Defendants CITY OF BERKELEY, CITY OF BERKELEY CITY COUNCIL, CITY OF BERKELEY WATERFRONT COMMISSION, and DOES 1 through 20, inclusive, as alleged herein, Plaintiffs have suffered the following damages:

The reasonable rental value according to proof at trial for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc., including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520, 0-601, 0-813,0-815, and Y-002.

Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases, adjustments for inflation, etc.

General and compensatory damages, including without limitation, lost wages, telephone expenses, photocopying expenses, and other out-of-pocket losses, cancellation of various Sea Scouting activities due to loss of funds, general impairment of Sea Scouting activities due to loss of funds, loss of members in Berkeley Sea Scouts because certain members could no longer afford to participate in the program due to the financial impact of the City of Berkeley's actions, etc. in a sum according to proof at trial.

Emotional distress and suffering, including without limitation, nervousness, grief, anxiety, worry, sense of

powerlessness, feeling of oppression, sense of helplessness, mortification, shock, humiliation, shame, indignity, impairment of reputation, embarrassment, apprehension, fear and ordeal in a sum according to proof at trial.

Reasonable attorney fees incurred to date and as incurred in the future and prejudgment interest thereon until paid.

Civil statutory damages permitted by law under Civil Code section 52 ($1,000) for each violation and for each Plaintiff.

WHEREFORE, Plaintiffs pray judgment against Defendants, and each of them, as follows:

1. For the reasonable rental value, in a sum according to proof at trial, for the loss of use of six (6) berths, two dry storage spaces and one dock locker for free which the Berkeley Sea Scouts have been deprived of commencing in June of 1998, and continuing into the future for the next 100 years with periodic adjustments for inflation, etc.. Including, without limitation, the following Berkeley Marina berth spaces Slip 0-320, 0-520,0-601,0-813,0-81 5, and Y-002.

2. For Berkeley Marina berth rental fees of $433.00 per month relating to the Berkeley Sea Scout ship Farallon which commenced in June, 1998, and will continue into the future for the next 100 years with periodic rate increases, adjustments for inflation.

3. For general and compensatory damages, including without limitation, lost wages, telephone expenses, photocopying expenses, and other out-of-pocket losses, cancellation of various Sea Scouting activities due to loss of funds, general impairment of Sea Scouting activities due to loss of funds, loss of members in Berkeley Sea Scouts because certain members could no longer afford to participate in the

program due to the financial impact of the City of Berkeley's actions.

4. For emotional distress and suffering, including without limitation, nervousness, grief, anxiety, worry, sense of powerlessness, feeling of oppression, sense of helplessness, mortification, shock, humiliation, shame, indignity, impairment of reputation, embarrassment, apprehension. fear and ordeal.

5. For reasonable attorney fees incurred to date and as incurred in the future, including prejudgment interest thereon until paid.

6. For civil statutory damages permitted by law pursuant to Civil Code section 52, and Berkeley Municipal Code section 13.28.080.

7. For costs of suit herein;

8. For such other and further relief as the Court may deem proper.

LAW OFFICES OF JONATHAN D. GORDON

DATED: July 16, 2001

Jonathan D. Gordon
Attorney for Plaintiffs

Appendix E-1

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 5, 2006

Mr. John H. Findley
Pacific Legal Foundation
3900 Lennane Drive
Suite 100
Sacramento, CA 95834

Re: Eugene Evans
v. City of Berkeley, California
Application No. 05A1102

Dear Mr. Findley:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on June 5, 2006 extended the time to and including July 7, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Sandy Spagnolo

Sandy Spagnolo
Case Analyst

Appendix E-2

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

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Ms. Manuela Albuquerque
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Berkeley, CA 94704

Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-3600

Supreme Court, U.S.
FILED
SEP 11 2006
OFFICE OF THE CLERK

No. 06-40

In The Supreme Court of the United States

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of California

RESPONDENT CITY OF BERKELEY'S BRIEF IN OPPOSITION

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESPONDENT CITY OF BERKELEY'S RESTATEMENT OF THE QUESTIONS PRESENTED

Respondent City of Berkeley ("City") restates the questions presented by Petitioner for two reasons. First, Petitioner failed to alert the Court to a threshold jurisdictional flaw in Petitioner's standing to recover damages allegedly suffered by a sea-scouting program of the Boy Scouts of America ("BSA"), an absent party, when the City terminated BSA's subsidy. Second, Petitioner's questions presented included misstatements or omissions of material fact. Respondent City therefore reformulates the questions presented as described next.

1. As a threshold jurisdictional matter, does Evans, an adult scout leader, have standing to recover damages allegedly suffered by BSA, who is not a party, when the City terminated its subsidy of BSA's sea-scouting program because of BSA's exclusionary policies against gays and atheists?

2. May a state or local government require a private provider of *publicly-funded services to the public*, to provide reasonable written assurances that the program will be open to all members of the public who are eligible for the publicly-funded services, without discrimination, or does such a funding condition violate the First Amendment?

3. Is a state or local government's funding requirement – that subsidized public services will be open to all members of the public, without discrimination – violate the Equal Protection rights of vendors who fail to provide such written assurances because of their private exclusionary beliefs?

LIST OF PARTIES

Individual youth participants in BSA's sea-scouting program in Berkeley and Eugene Evans, who is an adult scout leader and the skipper of one of the BSA chartered boats, originally filed petitioner Evans' complaint against the City of Berkeley seeking damages suffered by BSA. *BSA itself is not a party.* No individual youth participants in the BSA program *are parties in this Court*, even though they were parties in the California Supreme Court. Petitioner Evans, an adult scout leader, is the sole petitioner in this Court.

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RESPONDENT CITY OF BERKELEY'S BRIEF IN OPPOSITION

Respondent City of Berkeley (hereafter "City") respectfully prays that petitioner Evan's Petition for a Writ of Certiorari to review the unanimous decision of the California Supreme Court be denied.

JURISDICTION

Evans lacks standing to recover damages suffered by BSA, an absent party. Thus, this case does not present an Article III case or controversy and this Court lacks jurisdiction to decide it.

STATEMENT OF THE CASE

Petitioner Evans' statement of the case is misleading both as to its inclusions and material omissions. Besides, he fails to append sufficient material parts of the record to enable this Court to properly consider the Petition. Accordingly, Respondent City's Brief in Opposition sets forth an independent and complete recitation of the material facts and cites to documents contained both in the Appendix to the Petition and the Appendix to the City's Brief In Opposition. The documents in the Appendix to the City's Brief are alphabetized sequentially to succeed the appendices in the Petition and thus begin with the letter E.

In sum, Evans, an adult participant in BSA's sea-scouting program, seeks in his First Amended Complaint to recover damages from the City of Berkeley, which were allegedly suffered by the Boy Scouts of America and its

regional corporate arm, the Mount Diablo Silverado Council (referred to here collectively as "BSA"). These damages were allegedly caused by the City's 1998 termination of its funding subsidy of BSA's sea-scouting program at the Berkeley Marina. The City's withdrawal of the subsidy was prompted by BSA's refusal to provide reasonable written assurances that the City-subsidized program for the public would not discriminate against participants in the program on listed bases, including sexual orientation and religion. BSA advised the City that BSA's programs, such as the sea-scouting program, are controlled by BSA's exclusionary policies against gays and atheists.

Petitioner's counsel conceded that this was the case to the California Supreme Court. These facts are described in greater detail next.

1. BSA Was The Sole Recipient Of City Subsidy From 1945 to 1997

In 1945, the Berkeley City Council adopted a resolution that granted BSA use of one berth and mooring facilities for seven boats free of charge at the Berkeley Marina. The resolution was appended as Exhibit C to Petitioner's First Amended Complaint (hereafter "FAC") App. E-1. The subsidy was terminable on 30 days written notice. *Id.* In 1989, the City Council rescinded that resolution and replaced it with a new resolution granting the Boy Scouts of America, Mt. Diablo Council, a fee waiver for six berths, two dry storage spaces and one dock locker at the Berkeley Marina for its sea scouting program. Exhibit D to FAC, App. F-1-2.

The Mount Diablo Silverado Council is "a California nonprofit corporation chartered by the National Council of

the Boy Scouts of America to oversee, facilitate and administer the provisions of an effective scouting program within the council's geographic area." *Curran v. Mount Diablo Silverado Council*, 17 Cal. 4th 670, 678, 952 P.2d 218, 223, 72 Cal.Rptr. 410, 415 (1998). The FAC at paragraph 101 describes the sea-scouting program as a "subdivision of BSA." App. D-42.

Petitioner's counsel conceded in both the trial court and the California Supreme Court that the Berkeley sea-scouting program is controlled by BSA's policies. App. A-20. Such a factual concession is binding on Petitioner under California law. App. A-21. Petitioner admitted that those policies include compliance with BSA's exclusionary policies against atheists and gays. App. A-3 n.1, 20.

2. The March 1997 Marina Resolution Was Adopted To Respond to Requests By Two Additional Groups Who Sought City Subsidies For Their Programs

Until March 1997, BSA was the only group receiving a berthing subsidy at the Berkeley Marina. At the time, four free berths were allocated to the sea-scouting program, valued at an annual cost of $21,900. The Nautilus Society, which provided educational programs, and a private individual who took children on San Francisco Bay trips, wanted to avail themselves of similar but more modest benefits. When these additional groups sought the subsidy, the City Manager recommended that the Council adopt a resolution to guide it in considering these requests. App. G. The Council adopted the Marina Resolution. App. H. The California Supreme Court took judicial notice, under California law, of the undisputed legislative history of the City Council action challenged in this case. App. A-3-6.

Under the Marina Resolution, community organizations seeking a berthing subsidy had to: 1) provide a beneficial public service that outweighed revenue lost by waiver of the berthing fee; 2) operate a regular and ongoing activity; 3) create a presence in the Marina that is of great service to the community; and 4) not duplicate services provided by a private business operator.

The Marina Resolution also recited the Marina's policy of prohibiting discrimination in Marina facilities on the basis of race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition. Organizations applying for free berths were required to demonstrate their compliance with these policies through written membership policies and practices, mission statements, recruitment strategy and outreach to underrepresented populations. App. H.

3. BSA's Sea-Scouting Program Is the Only Program That Failed To Provide Requested Written Assurances of Non-Discrimination; The Other Three Subsidized Programs Complied

The FAC alleges that three other organizations received free berth space at the Marina: the Nautilus Institute, the Cal Sailing Club and the Berkeley Yacht Club. FAC ¶ 46, App. D-21. Petitioner's counsel admitted to the trial court that the other organizations "were able to say that they would not discriminate on the basis of sexual orientation" while "the Sea Scouts because of their association with the Boy Scouts could not say . . . we do not discriminate on the basis of sexual orientation." Reporter's Transcript, April 30, 2001, p. 29 4-7, 16-22, App. I-2. As the

California Supreme Court noted in its opinion, admissions of counsel during these proceedings are binding and deemed admitted facts under California law. *See* App. A-20-21.

4. Evans' Counsel Conceded That The Berkeley Sea-Scouting Program And BSA Are One And The Same With Respect To Policies Concerning Discrimination Against Gays And Atheists

Petitioner's counsel conceded before the California Supreme that the Sea Scouts and BSA were "one and the same" with respect to discrimination. "We are bound by what the Boy Scouts tell us we have to do." The Court then stated: "We accept these concessions by plaintiffs as establishing, even as against any contrary allegation or implication of the complaint, that the Sea Scouts could not truthfully state, consistent with the limitations imposed on them, that they would not in the future discriminate against openly gay or atheist participants." App. A-20. For this reason they instead supplied a letter dated April 8, 1998 which represented only that their policy was not to inquire about sexual orientation and not discriminate on the basis of religious preference rather than religion. Petition p. 4.

5. The City Council Rejected The Waterfront Commission's Recommendation To Continue The BSA Subsidy As Long As The Discriminatory Policies Were Changed Within A One-Year Grace Period

The Waterfront Commission recommended to the City Council that the BSA subsidy be continued for a one-year

grace period as long as the sea scouts agreed to convince BSA to allow them to bring their policies into conformance with the City's Marina nondiscrimination policy within that grace period. App. K. The City Council, however, *rejected the Waterfront Commission's recommendation.* App. A-4-5, 18-19.

At its May 5, 1998 meeting, the Council received a report from the City Manager recommending that the Council deny the free berths based upon an attached City Attorney's opinion concluding that the provision of free berths would violate a City ordinance which forbade discrimination on the basis of sexual orientation in City-funded programs and services and the Council's Marina Resolution. App. J. The City Attorney's opinion reported to the City Council that BSA's counsel had advised the City Attorney that the Berkeley sea-scouting program could not deviate from BSA's policies, including the required exclusion of atheists or avowedly gay persons. App. J-2-3. Petitioner's counsel conceded these facts in the California Supreme Court as well. App. A-20.

The City Council thereupon voted to deny the free berths at the Berkeley Marina "due to the Boy Scouts of America's discriminatory policies against gays and atheists." App. A-23-24; App. K. Pursuant to the terms of the 1989 resolution granting BSA the free berths, the City then terminated *BSA's subsidy* for the sea-scouting program. App. A-23-24; App. F-2.

6. Evans Shares The City's Viewpoint In Its Nondiscrimination Policy Favoring Inclusion of Gays and Atheists; He Alleges That The Berkeley Program Has Historically Included Both Gays And Atheists

The California Supreme Court noted that the plaintiffs before the California Supreme Court, including Evans "disavow both in their complaint and in their briefs in [the California Supreme Court] any desire to discriminate on the basis of sexual orientation or religion. They therefore cannot, and do not, claim that Berkeley, by requiring them to refrain from such discrimination is restricting their membership for purposes of expressive association." App. A-17. Evans' complaint alleged that the Berkeley sea-scouting program has historically included gays and atheists. App. D-22.

7. Evans Seeks To Recover Damages Allegedly Suffered By BSA, A Non Party

The City rescinded the berthing subsidy to BSA for six berths, two dry storage spaces and a locker. The subsidy was issued to BSA Mount Diablo Council under the Council's 1989 resolution, not to Evans. *See* App. F. Evans, who is only a scout leader, purports to recover *damages to BSA's sea scouting program* when the City subsidy to BSA was terminated, as the City now describes.

The FAC seeks: 1) the rental value of six berths, two day storage spaces and one dock locker from June 1998 for the next 100 years; 2) rental fees of $433 per month for one Sea Scout vessel from June 1998 for the next 100 years with adjustments for inflation; 3) general and

compensatory damages including lost wages, telephone expenses, photocopying expenses and other out of pocket losses, cancellation of various Sea Scouting Activities due to loss of funds, general impairment of Sea Scouting activities due to loss of funds, loss of members and related emotional distress. D-53-54.

8. All Causes of Action Except Claimed Violations of Equal Protection and The First Amendment Have Been Finally Resolved Against Evans; He is the Only Petitioner In The United States Supreme Court

The FAC alleged multiple causes of action for breach of implied, oral and express contracts, estoppel, implied covenant of good faith and fair dealing and various claimed violations of state statutes. The only cause of action asserting a violation of federal or state constitutional rights (along with statutory theories) was the fifth cause of action. All causes of action sought to recover the damages described above to *the BSA program*, not to any individual participant.

The trial court and California Court of Appeal dismissed all the causes of action. *See* App. B and C. Petitioners only sought review in the California Supreme Court on claims under the First Amendment and Equal Protection clause and their California Constitutional counterparts. The California Supreme Court affirmed the dismissal of these claims. App. A. The instant petition then ensued on behalf of a single Petitioner, Evans, who raises only First Amendment and Equal Protection claims. Petition p. (i).

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because: 1) Petitioner Evans lacks standing to recover damages incurred by BSA, an absent party, and thus this Court lacks jurisdiction to decide a matter which fails to present an Article III case or controversy; 2) the California Supreme Court decided this case on the *facts*, which Petitioner misrepresents, and thus certiorari is not appropriate under Rule 10 to challenge facts determined by a State Supreme Court over which this Court lacks supervisory power; and 3) The California Supreme Court considered, correctly enunciated and carefully applied all the applicable decisions of this Court and the circuit courts reading them in the light most broadly protective of First Amendment and Equal Protection rights. It correctly rejected Petitioner's claim on its facts and not on any misapplication of federal law. Thus, there is simply no basis under Rule 10 for certiorari review. The City addresses each of these arguments in turn below.

I. PETITIONER HAS NO STANDING TO RECOVER DAMAGES SUFFERED BY BSA, AN ABSENT PARTY; THIS COURT LACKS JURISDICTION UNDER ARTICLE III

A. A Petitioner Seeking Certiorari Review By The United States Supreme Court Has The Burden Of Establishing That He Has Article III Standing To Obtain The Relief Sought In His Complaint

Just this year, this Court reiterated "We have 'an obligation to assure ourselves' of litigants' **standing** under **Article III**." *DaimlerChrysler Corp. v. Cuno*, ___ U.S. ___,

126 S.Ct. 1854, 1863 (2006). "Determining that a matter before the federal courts is a proper case or controversy under Article III therefore assumes particular importance in ensuring that the Federal Judiciary respects '"the proper – and properly limited – role of the courts in a democratic society,"' [citations omitted]. If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1860-61. The Petitioner carries the burden of establishing his standing. *See id.* at 1861.

This jurisdictional limitation applies with equal force, even if a case originated in a state court, and the state's highest court decided the federal issue on its merits. *Doremus v. Board of Education*, 342 U.S. 429, 434-435 (1952).

> We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

See also Princeton University v. Schimd, 455 U.S. 100, 103 (1982). "That Princeton had standing in state court does not determine the power of this Court to consider the issue. Any determination of who has standing to assert constitutional rights is a federal question to be decided by the Court itself." *Id.*

B. Petitioner Evans Must Suffer An "Injury in Fact" Caused By The City's Policy Which is Redressed By The Requested Relief Sought In His Complaint – He May Not Pursue Damages Suffered By BSA, An Absent Party

In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998), the Court summarized the three elements that form the "irreducible constitutional minimum of standing" under Article III of the Constitution to sue in federal court:

> First and foremost, there must be alleged (and ultimately proved) an "injury in fact" – a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" [Citations omitted.] Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. [Citations omitted.] And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury. [Citations omitted.] This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. [Citations omitted.]

"[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that *the party seeking review be himself among the injured.*" (Emphasis added.) *Sierra Club v. Morton*, 405 U.S. 727, 734 (1971).

C. Petitioner Evans Does Not Have Standing To Recover Damages Suffered By BSA

Article III jurisdiction cannot be invoked to redress the rights of absent third parties. "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action. . . . '" *Warth v. Seldin*, 422 U.S. 490, 505 (1975). (Low income plaintiffs who seek to invalidate a City's restrictive zoning provisions have no standing because they cannot show that they themselves were excluded or their rights were violated.). *See also Bender v. Williamsport Area School District*, 475 U.S. 531, 534 (1985). ("We concluded that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.")

In other words, Evans " . . . has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 167 (1972) citing *Virginian R. Co. v. System Federation*, 300 U.S. 515, 558 (1937); *Erie R. Co. v. Williams*, 233 U.S. 685, 697 (1914).

As the City explained earlier in its Statement of the Case, the City Marina subsidy for six berths, two storage spaces and a locker free of charge were provided to BSA, Mount Diablo Council, the California nonprofit corporation that oversees BSA's programs within its geographical area, including Berkeley. F-1-2; *Curran v. Mount Diablo*

Silverado Council, 17 Cal.4th 670, 678 (1998). The challenged City action at issue is the City Council's termination of the BSA subsidy. The damages sought in the complaint are to the BSA sea-scouting program for loss of the subsidized six berths, storage lockers and dry dock space and related impacts on the sea scouting program, which cannot be recovered by any individual program participant or scout leader.

Under the third prong of the standing test enumerated in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. at 102-04, that of redressability, Petitioner must show a likelihood the requested relief will redress the alleged injury. While the requested damages might have redressed an injury in fact to BSA, it is not a party. Evans cannot and does not purport to sue on BSA's behalf. Conversely, the relief he seeks does not address an injury to him nor does his complaint pray for injuries to him personally but to the Berkley sea-scouting program of BSA, an absent party. Thus, Evans himself simply does not have Article III standing to pursue this action for damages suffered by BSA.[1]

According to the Petition, Evans was "duly authorized to bring this action in a representative capacity on behalf of the other Sea Scout Program participants past and future." Petition pp. 2-3. In the FAC, Evans alleges that

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[1] Indeed, under California law, even a member of a nonprofit corporation is prohibited from instituting or maintaining an action in the right of the corporation, unless the action is a derivative suit. (*Gantmann v. Union Pacific Insurance Company*, 232 Cal.App.3d 1560, 1567 (1991); 284 Cal. Rptr 188, *citing* California Corp. Code § 7710.) Evans has not even alleged that he is a member of the Mount Diablo corporation but merely an adult "program participant" in its chartered Berkeley sea scouting program. FAC ¶ 11, D-6, 7.

the sea-scouting program has no organizational structure and "simply meet and have met *informally*." "*Anyone* is permitted to attend meetings and have their opinions heard at such meetings. . . . Any action to be taken is discussed by persons attending the meetings." (Emphasis supplied.) FAC ¶ 11, D-4-5. Petitioner does not allege any facts as to how this *ad hoc*, informal gathering, whose composition varies from meeting to meeting, based upon "anyone" who attends that day, can "duly authorize" Evans or anyone else to obtain damages on behalf of all sea-scouting participants, past and future, for damages incurred to a BSA program operated by its regional arm, a California nonprofit corporation. More importantly, he does not explain how any participant, including Evans, would individually have the right to recover damages for 100 years of rental fees for six berths and the like prayed for in the complaint, since the FAC acknowledges throughout that the alleged damage is to BSA's sea scouting program, and not to any individual.

In addition, Petitioner has failed to demonstrate an "injury in fact" to him rather than to BSA, under either the Equal Protection clause or the First Amendment caused by the City's nondiscrimination policy since he admits to sharing the City's viewpoint favoring the inclusion of gays and atheists in City-funded programs. App. A-17. Indeed, Evans alleges that he has actively thwarted BSA's policies for years by admitting both gays and atheists. App. D-24-25.

Accordingly, Evans lacks standing and cannot assert the rights of an absent third party as noted in *Warth v. Seldin*, *supra*, 422 U.S. at 499 and *Bender v. Williamsport Area School District*, 475 U.S. 531, 534.

II. PETITIONER MISSTATES THE FACTS

The Petition is replete with misstatements of fact or material omissions. For example, the Petitioner frequently cites to the California Supreme Court's opinion when the Court was merely reciting Petitioner's legal arguments or sections of its complaint. Yet, Petitioner fails utterly to provide the Court's factual analysis and rejection of those claims based upon all the judicially noticed facts in the record, such as the undisputed legislative record. Although it is axiomatic that this Court's review under Rule 10 cannot be predicated on deciding disputed facts, this is particularly true when the Petition for a Writ of Certiorari seeks to review the decision of the highest State court, since this Court has no supervisory power over such a court under 28 U.S.C. § 1257(a).

A. The California Supreme Court's Procedural Determinations As To Judicially Noticed Facts Deemed True Are Not Subject to Review By The United States Supreme Court

"It is beyond dispute" that the United States Supreme Court does not "hold a supervisory power over the courts of the several States." *Dickerson v. United States*, 530 U.S. 428, 438 (2000) *citing Smith v. Phillips*, 455 U.S. 209, 221 (1982). The Supreme Court's authority is limited to enforcing the dictates of the United States Constitution. *Dickerson v. United States*, 530 U.S. at 438, *citing Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991). Federal courts may not impose procedural requirements in state courts. *Dickerson v. United States*, 530 U.S. 438, *citing Harris v. Rivera*, 454 U.S. 339, 344-45 (1991).

In *Smith v. Phillips*, 455 U.S. 209, 221, a prisoner was granted a new trial on a writ of federal habeas corpus because of prosecutorial and juror misconduct. *Id.* at 211-14. In reversing the federal habeas remedy the Court stated, "Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. [citations omitted]. No such wrong was present here." Similarly, in *Sanchez-Llamas v. Oregon*, 2006 WL 1749688 (June 28, 2006), the Supreme Court rejected petitioner's claim that the Court had the power to impose the remedy of suppression of evidence on the state court for violations of the consular notification requirement of the Vienna Convention. Relying on *Dickerson* and *Smith*, the Court noted that the Supreme Court has no supervisory authority over state-court proceedings and did not have the power to "direct Oregon courts to exclude Sanchez-Llamas' statements from his criminal trial." *Id.* at 8.

Thus, while this Court applies its independent judgment to weighing the facts in drawing its conclusions of law on federal constitutional questions, it is bound by the California Supreme Court's determination of the facts that must be deemed admitted in this case, since that conclusion is a matter of procedural California law, over which this Court has no supervisory authority.

B. Petitioner Makes Material Misstatements

Petitioner makes material misstatements of fact that are contradicted by his own admissions to the courts in these proceedings.

1. Petitioner Repeatedly Differentiates Between The Sea Scouts And BSA Even Though He Conceded To The California Supreme Court That They Are One And The Same

Evans' most glaring misstatement is his repeated differentiation between the "Sea Scouts" and the "Boy Scouts" as though they are distinct organizations and his claim that the City penalized the Sea Scouts because of their "association with the Boy Scouts". *See, e.g.*, Petition pp. i, 6, 7, 9, 15, 18, 19-20, 28. Petitioner's counsel conceded before the California Supreme Court that the Sea Scouts and BSA were "one and the same" with respect to discrimination. "We are bound by what the Boy Scouts tell us we have to do." The Court then stated: "We accept these concessions by plaintiffs as establishing, even as against any contrary allegation or implication of the complaint, that the Sea Scouts could not, consistent with the limitations imposed on them, truthfully state they would not in the future discriminate against openly gay or atheist participants." App. A-20. Thus, Evans conceded that the BSA sea-scouting program simply did not and could not make the written assurances of nondiscrimination that the City's Marina policy required.

2. The City Exercised Its Discretionary Budgetary Authority To Fund Particular Programs To Provide Services To The Public; It Did Not Create A "Generally Available Benefit"

Beginning with the "Questions Presented" section of his Petition and repeatedly throughout the Petition, Evans describes the berthing subsidy as a "generally available

benefit." This is highly misleading. BSA was the only group receiving a subsidy from 1945 until 1998. App. E, F, G, H. The subsidy was eventually extended to fund only three other programs for the public at the Berkeley Marina. App. J. The City Council was engaged in the exercise of classically discretionary spending authority in the same manner as any other level of government. Discretionary funding programs are not a "generally available benefit." Unquestionably, the decision as to what services or programs will best serve citizens and how such programs should be structured is vested in the City Council as the people's elected representatives. The Council could not lawfully delegate its authority to decide how and on what terms public funds should be allocated to every private supplicant who seeks public funds. The City Council merely exercised its discretion to fund and structure a program to provide services to the public. It conditioned the service to ensure that it would be available to all intended beneficiaries without discrimination.

3. The BSA Sea-Scouting Program Was The Only Subsidy Applicant That Failed To Comply With The Marina Resolution

Evans claims that "no other subsidy applicant was required to submit a letter" such as the April 8, 1998 letter. Petition p. 19. This statement flatly contradicts Evans' lawyer's concession to the trial court, by which he is bound, that the other organizations "*were able to say* that they would not discriminate on the basis of sexual orientation" while "the Sea Scouts because of their association with the Boy Scouts could not say . . . we do not discriminate on the basis of sexual orientation." April 30,

2001 Reporter's Transcript, p. 29 4-7, 16-22, App. I-2. As the California Supreme Court noted in its opinion, admissions of counsel during these proceedings are binding and deemed admitted facts under California law. *See* App. A-20-21.

4. The Waterfront Commission's Recommendation To Continue The Subsidy Was Only Advisory To The City Council, Who Rejected It

The City's Waterfront Commission tried to help the sea scouts continue to receive the subsidy when it became apparent that BSA's Mount Diablo Council would not allow the sea-scouting program to provide reasonable written assurances that it would not discriminate against atheists and on the basis of sexual orientation, as required by the Marina Resolution. App. I. The Commission recommended to the Council that the subsidy be continued for a one-year grace period as long as the scouts agreed to bring their policies into conformance with the City's Marina nondiscrimination policy within that grace period. App. L.

Evans has doggedly maintained that the Commission's essentially benign but *rejected recommendation* to the City Council, constituted compelled speech. Petition p. 15. The California Supreme Court responded to this claim by pointing out the obvious – that the City Council *rejected* the Waterfront Commission's recommendation to continue and condition the subsidy. A-19. The Council instead voted to deny the subsidy "due to BSA's policy of discrimination against gays and atheists." App. A-6. Citing to its complaint at D-21, D-23 and D-24. Evans responds thus "the Sea Scouts had already been required to comply with the

Waterfront Commission's demands as a condition of its recommendation." Petition p. 15. The cited sections of Evans' complaint establish no such thing and appear to be irrelevant to this issue.

As the City next explains, it is Evans' misstatement of these facts as well as his mischaracterization of this Court's opinions and the California Supreme Court's analysis of them that give rise to his contention that the unanimous California Supreme Court decision conflicts with this Court's precedents.

III. THE CALIFORNIA SUPREME COURT THOROUGHLY AND CORRECTLY ANALYZED AND APPLIED EACH CASE CITED BY EVANS; IT REJECTED EVANS' CLAIMS BASED ON THE FACTS

Evans cites a potpourri of inapposite First Amendment cases concerning the conditioning of government employment or contracts on the basis of political patronage, content or viewpoint based restrictions on speech in a public forum, government compulsion of private speech and the invalidity of laws which required the inclusion of unwanted members in private clubs *if* their inclusion would interfere with the club's message. Nothing in the California Supreme Court's holding in this case has any bearing on any of these cases or principles let alone provides any basis to erode their holdings in any manner.

Quite to the contrary, the imposition of nondiscrimination conditions on publicly-subsidized benefits ensures that the individual beneficiary of the government-subsidized program is protected from coercive demands by the government contractor for political, religious or other

fealty. The whole point of the Marina funding condition is to *prevent* political patronage or any other coercively imposed views on members of the public who may wish to avail their children and themselves of the subsidized recreational and educational programs about boating and San Francisco Bay at the Berkeley Marina.

As the City's description of the facts above attest, this case is about a routine and modest government action. In a classic exercise of the budgetary spending power, the City funded a handful of water related programs at the Berkeley Marina *for the entire public*. Its Marina nondiscrimination policy merely ensured that all members of the public had access to the programs that the City funded. It is unclear how ensuring that all youth could enroll in these programs about boating and the ocean, without discrimination, adversely impacted anyone's free speech or association. In any event, the government has no obligation, under the First Amendment, to fund any particular programs except those it decides serves the government's policies.[2]

A. The California Supreme Court's Decision Is Consistent With This Court's Decision On The Right of Expressive Association And Viewpoint Discrimination; The City's Policy Supports and Does Not Burden Evans' Viewpoint Since He Favors The Inclusion of Gays and Atheists In Sea-Scouting

Evans claims that the California Supreme Court decision is in conflict with this Court's decisions on freedom

[2] At pages 7-8 of his Petition, Evans makes gratuitous references to 20 U.S.C. § 7905, 42 U.S.C. § 5309 and sections of the California Government and Revenue and Taxation Codes. None of the cited sections have ever been at issue in this case before any court, including the California Supreme Court. Evans' reference to them is improper and should be disregarded.

of association and viewpoint discrimination. However, he has no standing to raise the issue since his own support for the inclusion of gays and atheists is consonant with the City's nondiscrimination policy.

The California Supreme Court noted that, Evans and the other petitioners below "disavow both in their complaint and in their briefs in [the California Supreme Court] any desire to discriminate on the basis of sexual orientation or religion. They therefore cannot, and do not, claim that Berkeley, by requiring them to refrain from such discrimination is restricting their membership for purposes of expressive association." App. A-17. Indeed, Evans' complaint alleges that the sea-scouting program has always included gays and atheists, in apparent flagrant violation of BSA dictates. Thus, Evans has no standing to claim that *his* rights of expressive association have been burdened by the City's nondiscrimination policy.

The California Supreme Court's understanding of the scope of the right of expressive association was taken directly from this Court's holding in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the lead case cited by Evans. *See* Petition p. 6. "The forced inclusion of an *unwanted person* in a group infringes the group's freedom of association *if* the presence of that person affects in a significant way the group's ability to advocate public or private *viewpoints*." (Emphasis supplied.) *Boy Scouts of America v. Dale*, 530 U.S. 647-48. Since Evans' viewpoint supports the inclusion of gays and atheists in sea-scouting, such members are neither "unwanted" nor does their inclusion under the Marina policy have any adverse effect on Evans' "ability to advocate a public or private viewpoint." *Id.* Indeed, it advances his viewpoint. Thus, Evans has stated

no claim for violation of *his* rights of expressive association.

Similarly, as a threshold *factual matter* the Marina policy cannot be said to adversely affect *Evans' viewpoint* in any way. Thus, he has no standing to charge viewpoint discrimination either. Indeed, even a claim of compelled-speech requires interference with the claimant's message. "The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld v. Forum for Academic & Institutional Rights*, ___ U.S. ___, 126 S.Ct. 1297, 1309 (2006).

The California Supreme Court nonetheless considered and rejected Evans' viewpoint discrimination argument after carefully analyzing all this Court's cases concerning funding subsidies. Evans lost this issue on the facts and not on any inadequate legal analysis by the California Supreme Court.

B. The California Supreme Court's Decision Is Consistent With This Court's Decisions Concerning Conditions On Government-Funding – The City Has Wide Latitude To Tailor Its Publicly-Funded Programs

The central fallacy of Evans' argument is to equate the First Amendment's restrictions on laws regulating expression with an absolute constitutional duty on the part of a state or local government to finance discriminatory clubs at taxpayer expense. During oral argument in the California Supreme Court, Evans' attorney admitted that, under his argument, the City would have a

constitutional duty to fund a youth boating program operated by the Ku Klux Klan or violate the Klan's associational rights.

Not only has this Court and the Circuit Courts taken no such position, this Court has indicated quite the contrary. In *Locke v. Davy*, 540 U.S. 712, 720-21 (2004), the Court upheld the Washington state constitution's prohibition on the funding of religious scholarships noting the claimed disfavor of religion "imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. *The State has merely chosen not to fund a distinct category of instruction*" (Citations omitted.) (Emphasis added).

The important distinction between achieving policy objectives through financial incentives rather than statutory coercion was also noted in *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 669 (2004). The Court invalidated a statutory mandate to undertake internet filtering of matter harmful to minors in light of the availability of other less restrictive alternatives such as requiring such filters to be installed as a condition of public library funding which it had previously upheld in *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).) "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objective. . . . " *United States v. Am. Library Ass'n*, 539 U.S. at 202.

The California Supreme Court found this Court's holding in *Grove City College v. Bell*, 465 U.S. 555 (1984)

to be virtually dispositive. App. A-11 "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that the educational institutions are not obligated to accept." *Id.* at 575. "Requiring *Grove City* to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the program infringes no First Amendment rights of the College or its students." *Id.* at 575-76.

The First Amendment does not guarantee a right to government funding of private speech. *See, e.g., Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983) (upholding denial of charitable exemptions to organizations attempting to influence legislation); *Cammarano v. United States*, 358 U.S. 498 (1959) (upholding treasury regulation that denied business expenses deductions for lobbying activities. "Congress has merely refused to pay for lobbying out of public monies. This Court has never held that the Court must grant a benefit such as [the plaintiff] claims here to a person exercising a constitutional right." *Id.*

Government funding conditions restricting speech have been invalidated when the goal of the funding program was to facilitate private speech. *Legal Services Corporation v. Velasquez*, 531 U.S. 533 (2001). Similarly, viewpoint discrimination is invalid when the government creates a public forum to encourage a diversity of views from private speakers. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Evans conceded during oral argument before the California Supreme Court that the City's funding of a handful of recreational programs at

the Marina did not create a public forum and that the sea-scouting program was not speech.[3]

Finally, it is improper to condition a government benefit on the benefited individual giving up an unrelated protected right. *See, e.g., Speiser v. Randall* 357 U.S. 513 (1958) (invalidating a prohibition on advocating the forcible overthrow of the government as a condition of tax-exempt benefits). Here, the City's Marina nondiscrimination policy was designed to prevent just such a coerced waiver of constitutional rights.[4]

Interestingly, the California Supreme Court takes a more restrictive approach to the review of government funding conditions under the California Constitution than required under the United States Constitution. *Compare Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 265, 625 P.2d 779, 172 Cal.Rptr. 866 (1981) *with Rust v. Sullivan*, 500 U.S. 173 (1991). The California Constitution's heightened scrutiny of such conditions requires that the funding conditions be germane to the funded purpose and not attempt to regulate behavior outside the funded program. Applying even these more

---

[3] Evans' claim, at pp. 23-25 of his Petition, that the California Supreme Court's decision conflicts with circuit court cases forbidding viewpoint discrimination in a public forum is belied by his own admission that the fee waiver did not create a public forum, boating is not speech, and his viewpoint supports the inclusion of gays and atheists in sea-scouting.

[4] This Court's recent decision in *Rumsfeld v. Forum for Academic Institutional Rights, supra* 126 S.Ct. 1297, upheld a First Amendment compelled speech challenge to the Solomon amendment, 10 U.S.C. § 983 under the war powers clause, Article I, Section 8, cl. 1 of the United States Constitution. Respondent City thus treats this holding as inapposite for this reason except to the extent it recites prior principles enunciated by the Court, which the City cited earlier in this brief.

restrictive standards, the Court concluded, *on the facts of this case*, that Berkeley merely required reasonable written assurances that it would not exclude members of the public otherwise eligible for the program on any of the prohibited bases listed in the Marina resolution. The Marina resolution did not regulate any behavior outside the program or of individual participants. App. A-15-16.

Evans actually concedes that a funding condition is permissible "when the government institutes a program or subsidy as an instrument of its own message or to perform governmental functions." Petition p. 13. The City's Marina policy of nondiscrimination was very much the City's own speech and message to the extent that it implicated speech at all. Certainly, the creation of recreational programs by fee waiver at the Berkeley Marina is a governmental function, otherwise, the fee waivers would have constituted an unlawful gift of public funds. Thus, under Evans' own formulation of the legal standards, the California Supreme Court's decision was consistent with this Court's decisions.

It is actually Evans who seeks to get around this Court's clear precedent by making the startling observation that budgetary discretion only applies to Congress' exercise of the Spending Power. Petition p. 12. This novel proposition not only stands federalism on its head, but also runs directly contrary to the plain language of this Court's recent unanimous decision in *DaimlerChrysler Corp. v. Cuno*, *supra*, 126 S.Ct. at 1863: "State policymakers, no less than their federal counterparts retain broad discretion to make 'policy decisions' concerning state spending 'in different ways . . . depending on their perceptions of wise fiscal policy and myriad other circumstances.'"

At the very heart of the First Amendment's protection of speech, association and expression is the right of elective franchise. It seeks to ensure that voters will have the opportunity to elect officials whose views on the propriety of particular expenditures and policies are consistent with their own. This is the very essence of representative government. The mere fact that these officials believe some public expenditures and policies to be sound and others to be wrongheaded, transgresses no First Amendment constraint. Quite to the contrary, it advances the First Amendment's core democratic right of elective franchise and representative government.

Justice Scalia put it well in his concurring opinion in *National Endowment of the Arts v. Finley*, 524 U.S. 569, 598 (1998):

> It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects – which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary. . . . None of this has anything to do with abridging anyone's speech.

C. Evans' Remaining Attacks On The California Supreme Court Decision Turn On Factual Misstatements

The rest of Evans' arguments are merely distortions of fact. For example, Evans' compelled speech claim rests entirely on the *false factual premise* that the Waterfront Commission's *recommendation* to give the sea-scouting program a one-year grace period was compelled speech even though the City Council rejected it. Petition p. 13-15.

The California Supreme Court pointed out this factual fallacy in Evans' legal argument. *See*, App. A-18-19. Evans claimed that he had already been required to comply with the Waterfront Commission's decision but cites to portions of the record that state no such thing. *See* City's discussion of Evans' misstatements of fact, *supra* at p.17.

Finally, Evans claims that the City did not act neutrally and singled it out. Petition pp. 18-19. However the undisputed legislative record belies this claim. BSA received favorable and exclusive subsidies for decades. The Marina resolution was adopted because other entities wanted to receive support for their community programs. Evans' attorney conceded that the other subsidy recipients supplied reasonable assurances that they would not discriminate on the requested bases whereas the sea-scouting program could not because it was bound by BSA discriminatory policies against gays and atheists. Once again, the California Supreme Court's rejection of Evans' argument turned on these facts and not on the California Supreme Court's misstatement of law.

In short, the California Supreme Court's opinion carefully considered every principle and case advanced by Evans in this Court in urging the granting of certiorari. It rejected his arguments based upon the facts in this case and not as a result of any legal error in conflict with decisions of this Court, the circuit courts or the courts of other States.

CONCLUSION

The writ should be denied both because this Court lacks jurisdiction and because there are no compelling reasons under Supreme Court Rule 10 that would warrant this Court's grant of a writ of certiorari.

Respectfully submitted,

Manuela Albuquerque, City Attorney
Counsel of Record
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
(510) 981-6950

Counsel for Respondent
City of Berkeley

APPENDIX E

RESOLUTION NO. 27,738-N.S.

AUTHORIZING THE BOY SCOUTS OF AMERICA TO USE CERTAIN BERTH AND MOORING FACILITIES IN THE BERKELEY YACHT HARBOR.

BE IT RESOLVED by the Council of the City of Berkeley as follows:

WHEREAS, the Boy Scouts of America have filed a request for the use without charge of one open berth and mooring facilities for seven boats in the Berkeley Yacht Harbor; and

WHEREAS, Section 5.1 of Resolution No. 23,605-N.S. provides for the granting by the City Council of the use of berth and mooring facilities in the Berkeley Yacht Harbor without charge, under such terms and conditions as said Council sees fit to impose.

NOW, THEREFORE, Be it resolved that the Boy Scouts of America are hereby granted the use without charge of one berth and mooring facilities for seven boats to be designated by the Harbormaster.

RESOLVED FURTHER, that said berth and mooring facilities shall be used by the Boy Scouts of America in accordance with all rules and regulations established by the City of Berkeley relative to the Berkeley Yacht Harbor, and said permission herein granted is subject to revocation by a 30 day written notice.

Approved as to form:

/s/ Fred C. Hutchinson
City Attorney

APPENDIX F

RESOLUTION NO. 42,885-N.S.

GRANTING A PERMIT TO THE BOY SCOUTS OF AMERICA, MT. DIABLO COUNCIL, FOR USE BY THE SEA SCOUTS OF SIX BERTHS, TWO DRY STORAGE SPACES AND ONE DOCK LOCKER WITHOUT CHARGE AT THE BERKELEY MARINA, UNDER CERTAIN TERMS AND CONDITIONS, AND RESCINDING RESOLUTION NO. 27,738-N.S.

BE IT RESOLVED by the Council of the City of Berkeley as follows:

WHEREAS, the Boy Scouts of America, Mt. Diablo Council, has requested permission for the use by the Sea Scouts of six (6) berths, two (2) dry storage spaces and one (1) dock locker, without charge, at the Berkeley Marina.

NOW, THEREFORE, Be it Resolved that a permit is hereby granted to the Boy Scouts of America, Mt. Diablo Council, for the use by the Sea Scouts of six (6) berths, two (2) dry storage spaces and one (1) dock locker, without charge, at the Berkeley Marina for the berthing of boats, to the extent such facilities are available, under the following terms and conditions:

1. The berths, dry land storage spaces and the dock locker to be used by the permittee shall be designated by the Marina Superintendent.

2. In the event all berths so designated are not used by the permittee, the unused berths may be assigned and rented to others during the period they are not used by the permittee.

3. In the event the permittee desires the use of additional berths, dry land storage spaces or dock lockers, permittee shall pay City at the applicable rates fixed therefor.

4. Permittee shall pay all costs of utilities and shall comply with all rules and regulations applicable to the Berkeley Marina.

5. The permit granted herein shall not be transferred or assigned.

6. The City of Berkeley reserves the right to revoke this permit at any time upon thirty (30) days written notice by the City Manager of City to permittee.

7. Permittee agrees that it will not refuse membership in its organization to any person on account of race, creed, color, national origin or ancestry, provided such person is otherwise qualified for membership, and further agrees that it will not discriminate against any person on account of race, creed, color, national origin or ancestry in the use of the facilities permitted by this resolution.

8. The permittee shall file with the City Clerk of the City of Berkeley a letter or signed copy of this resolution agreeing to be bound by the terms and conditions imposed by this resolution.

FURTHER, RESOLVED, that Resolution No. 27,738-N.S. be and it is hereby rescinded.

Approved as to form:

/s/ Robert T. Anderson
Assistant City Attorney

Copies sent 3/3/69
To: Boy Scouts of America
Recreation
Marina
Treasurer

RESOLUTION

No 42,885 N.S.

Dated: January 28, 1969

Adopted by the Council of the City of Berkeley by the following vote:

yes: Councilmen Brown, DeBonis, Dellums, Dewey, May, Sweeney, Swingle and President Johnson.
Noes: None.
Absent: Councilman Gordon.

/s/ Wallace J.S. Johnson
Mayor and President of the Council

Attest /s/ Edythe Campbell
City Clerk and Clerk of the Council

APPENDIX G

City of Berkeley

City Manager's Office
Martin Luther King Jr.
Civic Center Building
2180 Milvia Street
Berkeley, California 94704

TEL: (510) 644 6580
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E-MAIL: *manager@ci.berkeley.ca.us*

[LOGO]

COUNCIL ACTION
March 4, 1997
CR# 96-003

To: Honorable Mayor and
Members of the City Council

From: James Keene, City Manager

Subject: POLICY FOR USE OF MARINA BERTHS BY NON-PROFIT ORGANIZATIONS PROVIDING COMMUNITY SERVICE

RECOMMENDATION

That the City Council adopt a resolution approving a policy which provides berth space at the Berkeley Marina to non-profit organizations in exchange for services which benefit the community.

BACKGROUND

At its November 19, 1996 meeting, the Council referred a proposed policy back to the Waterfront Commission and the City Manager and requested a further review of the community service requirement and a diversity statement.

Staff discussed these issues with the Waterfront Commission on December 11, 1996. The attached resolution includes the Commission's recommendations which staff agrees are both practical and reasonable. The Commission approved the attached policy with a vote of 6-0-0 with three members absent. In favor: Commissioners Hobel, Frangos, Kawczynska, Smith, Wolgast and Wasson.

Current Status

The purpose of the policy is to establish criteria to evaluate non-profits who desire to receive berth space in exchange for providing community services. In the past, such requests by non-profits have been presented to the Council without any guidelines or criteria to determine if the loss in revenue would equate with the level of community service/benefit provided by the respective non-profit.

At this time, the Sea Scouts is the only group receiving berth space as compensation for community service. The Nautilus Society (an education group and operator of the *Pegasus*) and Dr. Robert Schmeider (who frequently takes local children on Bay trips on the *Cordell Explorer*), have requested a similar arrangement.

The attached resolution is different from the one presented to the Council in November, 1996 in that it more accurately reflects the Waterfront Commission's desire to encourage broader use of the Marina by traditionally under-represented users. In addition, the Commission recommends that providing berth spaces in exchange for community service should be approved by the Council on a case-by-case basis, after evaluating the level of community benefit.

FINANCIAL IMPA

Adoption of this policy may result in less revenue to the Marina fund. This impact is difficult to estimate because it depends on the number of applicants, future recommendations of the Waterfront Commission, and Council action.

For example, the approximate annual value of the four berths allocated to the Sea Scout is $21,900. The berth spaces for the *Pegasus* and the *Cordell Explorer* are worth about $5,600 per annum. The total in-lieu value of these spaces is $27,500 each year.

CONTACT PERSON

Guy Thomas, Chair, Waterfront Commission	841-3438
Cliff Marchetti, Waterfront Manager	644-6943

Approved by:

/s/ John Alderson
John Alderson,
Director of Parks and
Waterfront

Attachment A: Proposed Resolution

cc: Waterfront Commission
John Alderson, Director of Parks and Waterfront
Cliff Marchetti, Waterfront Manager

APPENDIX H

RESOLUTION NO. 58,859 – N.S.

ADOPTING A POLICY FOR THE USE OF BERTHS AT THE BERKELEY MARINA BY NON-PROFIT ORGANIZATIONS PROVIDING COMMUNITY SERVICES

WHEREAS, a number of non-profit organizations wish to occupy berths at the Berkeley Marina in exchange for community service; and

WHEREAS, the Waterfront Commission and the City Council have reviewed this issue.

NOW THEREFORE, BE IT RESOLVED that the City Council of the City of Berkeley hereby establishes the following policy for the use of the berths at the Berkeley Marina by non-profit organizations which provide community service:

A. QUALIFYING ORGANIZATIONS: MINIMUM REQUIREMENTS

1. Only those organizations which meet the following criteria shall be eligible to receive berth spaces in exchange for community service:

a. The purpose of the organization is to supply a beneficial public service.

b. The organization must conduct an activity on a regular and on-going basis.

c. The organization must clearly demonstrate that its presence in the Marina or its service to the community, as evidenced by the cost/benefit analysis provided by the non-profit, greatly exceeds the value of the berth.

d. The organization must provide a service not duplicated by a private business operator.

2. Only those organizations which demonstrate that they promote cultural and ethnic diversity, as evidenced by the following criteria, shall be eligible for consideration:

a. Membership policy and practices.
b. Recruitment strategy.
c. Outreach to under-represented populations.
d. Mission statement, if any.

The Berkeley Marina advocates and practices equal opportunity in terms of access to its berthing facilities. Availability and use of the facilities will not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition.

B. APPLICATION PROCEDURE

1. Non-profit applicants for berths at the Berkeley Marina must make written application to the Waterfront Manager stipulating the following:

a. Name and address of organization
b. Name, address & telephone number of person responsible for business affairs of the group.
c. Type of organization
d. Number of members of organization
e. Level of participation of members
f. Age-level of members of organization and/or participants
g. Contribution to community including hours of service (if applicable) and activities
h. Reason and justification for request
i. Time period/duration for use of Marina (indefinite or specific time period)

j. Copy of bylaws (if any)
k. List of completed and planned community projects
l. Financial statement for prior year

2. The Waterfront Commission shall review the application and make a recommendation to the Council that the provision of community services warrants berthing compensation commensurate with the public benefit.

C. REPORTING REQUIREMENTS, COMPLIANCE, AND ADMINISTRATION

1. All organizations which receive berthing space compensation in consideration for community services at the Berkeley Marina must comply with the following provisions:

a. On February 1 of each year, each organization must submit a report to the Waterfront Manager detailing the organization's community service for the prior calendar year, including the following:

1) Number of members of the organization and/or level of participation.
2) Number and type of community activities.
3) Number of persons participating in each activity both from the membership and from the community, if different.
4) Plans for the upcoming year for community service.

b. On February 1 of each year, each organization must submit a financial statement for the prior calendar year to the Waterfront Manager.

c. No later than the February meeting of the Waterfront Commission, or at its next meeting in the event there is no February meeting, each organization must

appear before the Waterfront Commission and describe its activities in the prior calendar year, as described in this section.

d. On August 1 of each year, each organization must submit to the Waterfront Manager a semi-annual report containing the information described herein for the first six months of the calendar year.

e. Any organization failing to provide the prescribed information and reports by the listed deadlines will be required to pay the normal fee charged for its berth or remove its vessel or material from the Marina within thirty (30) days notice by the Waterfront Manager.

2. Organizations which comply with the requirements of this policy and other applicable City ordinances and/or policies shall have any applicable berthing compensation renewed annually by the Council after a review and recommendation by the Waterfront Commission.

3. When the owner of private vessel requests a berth which is occupied by a vessel owned by a non-profit organization receiving berthing compensation for community services, the Waterfront Manager may require, with thirty (30) days advance notice, the vessel owned by the non-profit organization to move to another berth.

The foregoing Resolution was adopted by the Berkeley City Council on March 4, 1997, by the following vote:

Ayes: Councilmembers Armstrong, Breland, Maio, Olds, Shirek, Spring, Woolley, Worthington and President Dean.

Noes: None.

Absent: None.

/s/ Shirley Dean
Shirley Dean
Mayor and President
of the Council

Attest: /s/ Sherry Kelly
Sherry M. Kelly
City Clerk and Clerk
of the Council

APPENDIX I

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT

EUGENE EVANS, ET AL.,
PLAINTIFFS,

VS. NO. 809180-4

CITY OF BERKELEY, ET AL.,
DEFENDANT. /

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APRIL 30, 2001

FROM FINAL JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

FOR THE PLAINTIFFS:

FOR THE DEFENDANTS:

* * *

[29] THE DIFFERENTIAL TREATMENT HERE IS THAT THE CALIFORNIA SAILING CLUB AND THE NAUTILUS CLUB WERE ENTITLED TO STAY AND GET THE PREFERENCES FOR THE FREE BERTHS BECAUSE THEY WERE ABLE TO SAY THAT THEY WOULD NOT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION AND THEY WERE ABLE TO STAY FREE BECAUSE THEY'RE NOT ASSOCIATED WITH THE BOY SCOUTS. THAT CONSTITUTES A BARRIER.

THE BARRIER UNDER THE NORTHEASTERN FLORIDA, ET CETERA VERSUS CITY OF JACKSONVILLE SAID THAT:

> "ANY TIME A GOVERNMENT ERECTS A BARRIER THAT MAKES IT MORE DIFFICULT FOR ONE GROUP TO OBTAIN A BENEFIT THAN MEMBERS OF ANOTHER GROUP, THE INJURY IS THE DENIAL OF EQUAL TREATMENT AND IT'S A VIOLATION OF EQUAL PROTECTION."

THAT BARRIER HERE WAS THAT THE SEA SCOUTS, BECAUSE OF THEIR ASSOCIATION WITH THE BOY SCOUTS, COULD NOT SAY THE PRECISE WORDS THAT THE CITY ASKED FOR, WHICH WAS "WE DO NOT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION." WHAT THEY DID SAY WAS THAT "WE WILL OBEY THE LAWS THAT FORBID DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION."

THEY TRIED TO REACH A NEGOTIATION WITH THE CITY ON THAT AND TRIED TO COMPROMISE IT, OBVIOUSLY, TO OBTAIN WHAT THE CITY WANTED. NONE OF THE OTHER PERSONS OR ENTITIES THAT APPLIED FOR THE FREE BERTHS WERE SUBJECT TO THAT KIND OF SITUATION OR THAT KIND OF TREATMENT.

THE COURT: YOU TOLD ME THAT THEY DID SIGN OFF ON

* * *

APPENDIX J

City of Berkeley

City Manager's Office
Martin Luther King Jr.
Civic Center Building
2180 Milvia Street
Berkeley, California 94704

TEL: (510) 644 6580
FAX: (510) 644 6035

E-MAIL: *manager@ci.berkeley.ca.us*

[LOGO]

FOR COUNCIL ACTION
May 5, 1998

Date: May 4, 1998

TO: Honorable Mayor and
Members of the City Council

FROM: James Keene, City Manager

Subject: SUPPLEMENTAL REPORT REGARDING MARINA FREE BERTHS

RECOMMENDATION

That the Council deny free berths to the Berkeley Sea Scouts.

BACKGROUND

Attached for your information is a copy of the City Attorney's opinion concluding that the provision of free berths to the Berkeley Sea Scouts violates the City Council's March 4, 1997 resolution and B.M.C. section 13.28.060. For this reason, I recommend against approving such free berths.

Attachment

Approved:

/s/ Manuela Albuquerque
City Attorney

CITY OF BERKELEY

Memorandum

DATE: May 4, 1998

TO: JAMES KEENE, City Manager

FROM: MANUELA ALBUQUERQUE, City Attorney

SUBJECT: LEGALITY OF FREE BERTHS TO ORGANIZATION AFFILIATED WITH THE BOY SCOUTS OF AMERICA

ISSUE

Does the April 8, 1998 letter from the Berkeley Sea Scouts constitute compliance with the City Council's March 4, 1997 resolution concerning the provision of free berths at the Marina and Berkeley Municipal Code section 13.28.060 subdivision 3.

CONCLUSION

No.

ANALYSIS

I. The March 4, 1997 Council Resolution

On March 4, 1997 the Berkeley City Council adopted a policy which authorized waiver of the Berkeley Marina berthing fee for community organizations which were deemed to provide community services. In addition to setting criteria for the services which must be provided, the Council resolution authorized waivers to those organizations which "demonstrate that they promote cultural and ethnic diversity,. . . . " The resolution required that this commitment to diversity be reflected in membership policies, recruitment strategy, outreach to under represented populations and mission statements, if any. This segment of the policy went on to provide that facilities were not to be predicated on a persons' race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition. Since that time, the Waterfront Commission which is charged with implementing the Council resolution, has been inquiring into charges that the Berkeley Sea Scouts ("Sea Scouts") fail to comply with the Council resolution, because of the claimed practices of the Boy Scouts ("Boy Scouts") with respect to sexual orientation and atheists.

II. Chapter 13.28 of the Berkeley Municipal Code (BMC)

Berkeley Municipal Code chapter 13.28 prohibits discrimination on the basis of sexual orientation in employment, housing, business establishments, City facilities and services and educational institutions. Section 13.28.030 prohibits discrimination in City services and facilities. In addition to prohibiting discrimination in such services and

facilities when provided by the City itself, the section also makes it unlawful for any person to engage in such discrimination with respect to any program which is funded in whole or in part by City funds. Thus, Berkeley Municipal Code section 13.28.060, as a whole, would preclude the provision of free berths to the Sea Scouts if they discriminate on the basis of sexual orientation.

III. Relevant Scout Policies

The Sea Scouts have stated that they do not discriminate on the basis of sexual orientation or against atheists. They have not been willing, however, to adopt a policy which states expressly that the Scouts will not discriminate on the basis of sexual orientation. They state that they are unwilling to do so due to fear of losing their charter from the Boy Scouts. They have instead sent the April 8, 1998 letter, which is appended to the Waterfront Commission report. It states that the Scouts consider sexual orientation to be a private matter and that they will comply with Berkeley Municipal Code section 13.28.060. The Sea Scouts' written policy also states that they do not discriminate on the basis of religion.

Opponents of free berths for the Scouts have claimed that the Sea Scouts are part of the Boys Scouts, and that the latter organization has explicit policies which discriminate against atheisis and homosexuals. Thus, I turn next to the relationship between the Sea Scouts and the Boy Scouts and the latter's policies with respect to atheists and sexual orientation.

IV. Relationship Between Berkeley Sea Scouts and Boy Scouts Of America; Boy Scout Policies Relating To Sexual Orientation And Atheists

Neither the report from the Waterfront Commission nor any information submitted to it actually contained copies of any Boy Scouts policies or any description of their relationship with the Berkeley Sea Scouts. The local representatives of the Sea Scouts were likewise unable to provide any information regarding the Boy Scouts' national policies. Karl Rowley, the representative of the Mount Diablo Silverado Council of the Boy Scouts stated that the Boy Scouts received its charter from Congress. He said the Boy Scouts in turn chartered councils, such as the Mount Diablo Silverado Council, for each geographical area. Each council oversees and passes on requests for charters by local groups, such as the Sea Scouts. Mr. Rowley stressed that membership in any local group is actually membership in the Boy Scouts. This principle was also confirmed by the outside counsel for the Boy Scouts in New York, to whom I was referred by its General Counsel.

The information about the Boy Scouts national policies was obtained from Carla Kerr of the New York offices of Hughes, Hubbard and Reed. Ms. Kerr is the Boy Scouts' counsel in the recent California Supreme Court case, of *Curran v. Mount Dabble Council of the Boy Scouts of America* 98 D.A.R. 2802 (March 24, 1998). In that case the Court noted that the Boy Scouts considered avowed homosexuality and Scouting to be incompatible, because of the Boy Scouts longstanding belief that homosexual conduct was immoral and thus incompatible with the Boy Scout oath to be "morally straight. Ms. Kerr confirmed that the footnotes in that case describing the Boy Scouts policies were accurate with respect to the Boy Scouts

current policies in this regard. Ms. Kerr also confirmed that the Boy Scouts considered atheism to be inconsistent with the Boy Scouts' oath that a scout's duty is to "God" and country. Although the Boy Scouts do not discriminate between religions they do require Scouts to believe in God.

Ms. Kerr also stated that any local group, which did not adhere to the national policy which requires exclusion/ expulsion of avowedly gay or lesbian or atheist members or adult leaders, would lose its charter. She also stated that a local group which invoked a local law which required it to include persons who were avowedly gay would not be exempt from this Boy Scouts policy.

For all these reasons I conclude that the Berkeley Sea Scouts do not qualify as an organization entitled to free berths under the city Council's policy prohibiting discrimination on the basis of sexual orientation and religion and indeed that the provision of free berths would violate B.M.C. section 13.38.060.

Respectfully submitted

/s/ Manuela Albuquerque
MANUELA ALBUQUERQUE

cc: Lisa Caronna

APPENDIX K

May 5, 1998 COUNCIL MINUTES

14. **Discontinued Use of Marina Berth by the Sea Scouts**
From: Councilmembers Worthington, Maio, and Breland
Recommendation: That Council overturn the decision of the Waterfront Commission to give the Sea Scouts continued free use of the marina berths due to their discriminatory policies against gays and atheists.
a. Waterfront Commission Report
Recommendation: Approve applications for free berths at the Berkeley Marina for one year for all Sea Scout vessels which meet the City's application criteria, provided that the letter from the Sea Scouts dated April 8, 1998 is distributed to all Boy Scout members and persons associated with the Berkeley Sea Scout Program; and further provided that the Sea Scouts initiate a dialogue with the Mt. Diablo Boy Scout Council on changing the Boy Scouts discriminatory policy.
b. Waterfront Commission Minority Opinion Report
c. City Manager Report
Recommendation: The City Manager takes no position on this matter pending review and advice by the City Attorney, who will be prepared to provide such advice at the May 5th Council meeting.
d. City Manager Supplemental Report
Recommendation: Do not approve free berths for Sea Scouts based on a City Attorney's Opinion that doing so would be in violation of the City Council's March 4, 1997 Resolution and Berkeley Municipal Code Section 13.28.060.

Actions: Removed from the Consent Calendar by Councilmember Worthington. Moved, seconded, carried (Woolley/Breland; Noes – Olds) to deny free

berths in the Marina to the Sea Scouts due to the Boys Scouts of America's discriminatory policies against gays and atheists.

An amendment to the motion by Worthington carried (Noes – Shirek; Abstain – Olds, Woolley) to applaud and commend the Berkeley Sea Scouts efforts to modify the Boy Scouts' policies of discrimination related to religion and sexual orientation; to express pride in the leadership provided by the Berkeley Sea Scouts in challenging the National Boy Scouts; to acknowledge the enormous contributions to the community by Skipper Sangman, William Brazil, Gene Evans and other community leaders; to encourage the Sea Scouts' efforts toward independence in exploring changing to the "Learning For Life Program"; to encourage voluntary private efforts, including efforts of Councilmembers and Commissioners, to help the Berkeley Sea Scouts pay for berthing space during the transition period.

(2)

FILED
SEP 11 2006
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SUPREME COURT, U.S.

No. 06-40

IN THE

Supreme Court of the United States

EUGENE EVANS,
Petitioner,

v.

CITY OF BERKELEY,
Respondent.

On Petition for Writ of
Certiorari to the California Supreme Court

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL RIGHTS UNION AND CONGRESSMAN DAN LUNGREN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct or fit a particular ideology. Those setting ACRU policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Solicitor General, Robert H. Bork; Pepperdine Law School Dean, Kenneth W. Starr; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; George Mason Law School Professor, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management, J. Clayburn LaForce.

This is precisely the sort of case that is of interest to the ACRU because we are concerned that the rights of the Boy Scouts to advance the traditional values in which they believe are fully understood and rightly protected, and not undermined by political correctness.

Congressman Dan Lungren represents the 3rd Congressional District of California. He served as Attorney General of the state of California from 1991 to 1999. In that capacity, he pursued litigation to protect the rights of the Boy Scouts. He is concerned that the constitutional rights of the Boy Scouts to promote their traditional moral values be fully recognized and respected.

---

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU) and Congressman Dan Lungren. No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief. Their agreement to consent is enclosed with this brief.

STATEMENT OF THE CASE

This case involves the constitutional rights of a Boy Scout related organization that serves many disadvantaged youth to advance and remain faithful to the traditional moral values espoused by the Boy Scouts. Though advancing and practicing such traditional moral values is labeled by the Defendant City of Berkeley as discrimination, in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000) this Court directly and expressly held that the exact same actions and policies to which the City objects here are constitutionally protected under the right of freedom of expressive association. The question in this case is whether the City may penalize and discriminate against the Scouts for exercising the precise constitutional rights recognized by this Court in *Dale.* We submit that in doing so the City has violated the First Amendment and Equal Protection rights of the Berkeley Sea Scouts and the Boy Scouts.

As this Court noted in *Dale,*

> "Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression."

530 U.S. at 648-649.

The Berkeley Sea Scouts is comprised of volunteers working together in a nonprofit association as a subdivision of the national Boy Scouts of America, operating under the local Mount Diablo Council. App.A-2. Adults serving in the organization use Sea Scout vessels to teach teenage youth sailing and seamanship skills for only $7 a year. Id. The

Berkeley Sea Scouts are known for ethnic diversity and participation by the economically disadvantaged, with membership open to girls as well as boys. Id.

In the late 1930s, the Boy Scout Mount Diablo Council allowed the City of Berkeley to quarry rock from Council property free of charge to build the City's marina and breakwater. App.A-3. The city eventually used 80,000 tons of free rock and fill from the Scout property. App.D-8, D-9. In return, the City began allowing the Sea Scouts to use berths at the marina for free. App.A-3. This arrangement was formalized by City resolutions in 1945 and 1969. Id.

In 1997, the City adopted a new policy by resolution providing free berths to all non-profit community service organizations that met certain criteria. App.A-4. Among these is that use of the berths, "may not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability, or medical condition." App.A-4.

The California Supreme Court below found that the Berkeley "Sea Scouts have never actually discriminated against anyone on the basis of sexual orientation or religion." App.A-2. But the national Boy Scouts, of which the Berkeley Sea Scouts are a part, seek to promote traditional moral values among boys as a central mission of the organization. *Dale,* 530 U.S. at 649-650; *Randall v. Orange County Council,* 17 Cal. 4th 736, 741-742 (1998); *Curran v. Mount Diablo Council of the Boy Scouts,* 17 Cal. 4th 670, 681 (1998). These values include belief in God and in traditional sexual morality, as well as in patriotism, honesty, hard work, etc. *Dale,* 530 U.S. at 649-653; *Randall,* 17 Cal. 4th at 739, 741-742; *Curran,* 17 Cal. 4th at 681-682. Membership is open only to those who accept these values, and not to those who reject them. *Dale,* 530 U.S. at 651-653;

Randall, 17 Cal. 4th at 741-742; *Curran,* 17 Cal. 4th at 681-682. Consequently, membership is not open to those who embrace atheism or homosexuality. Id. In *Dale,* this Court held that the Boy Scouts have a constitutionally protected right to maintain these policies as part of expressing their beliefs and carrying out their mission, and the organization cannot be prohibited from maintaining these policies by anti-discrimination laws.

The Waterfront Commission that administers the marina asked the Berkeley Sea Scouts for a "local policy statement" ensuring that the group would not engage in discrimination, even though no other non-profit organization seeking free berths at the marina was asked for such a statement. App.A-5. The Sea Scouts provided the Commission a letter stating its policies, and the Commission recommended that the free berths for the group going back to the 1930s be continued, as the Scouts met all of the criteria for the new program providing free berths to eligible non-profit community service organizations. App.A-5. But the City Council rejected continued participation by the Sea Scouts in this program on the grounds that it disapproved of the national Boy Scout policies regarding atheism and homosexuality, found such policies to be discriminatory, and concluded that the Sea Scouts statement did not pledge not to follow those policies. App.A-6 to A-7.

In response, 14 individual adult and youth participants in the Berkeley Sea Scouts sued the City on behalf of themselves and other program participants alleging that the City had violated their First Amendment and Equal Protection rights under the U.S. Constitution. App.A-2, A-8, D-1 et seq. Among those Plaintiffs is Eugene Evans, who has participated in the Berkeley Sea Scouts program since he was age 13 in 1957. App.D-6. He is the most senior of the active Berkeley Sea Scouts, having served as a Sea Scout

Skipper, analogous to Troop Leader, for over 27 years. Id. Because of the loss of the free berths at the Berkeley marina, Evans, a career California school teacher, now personally pays over $500 per month in berth fees for the Sea Scouts. Id. As a result, Evans is now unable to pay the membership fees of disadvantaged youths. Id. He is also unable to continue to pay for community outreach and formerly free services and events such as cruises, meals, and overnight camping trips sponsored by the Sea Scouts, resulting in a loss of these services and events to the community. App.D-6 to D-7.

The trial court sustained the City's demurrer, and the Court of Appeal and California Supreme Court affirmed. Review of the constitutional claims brought by the Plaintiffs is now sought by this Court. *Amici* American Civil Rights Union and former California State Attorney General Dan Lungren urge this Court to grant such review because the City of Berkeley has violated the constitutional rights of Plaintiffs based on the precedents of this Court, the decision below is in conflict with those precedents, the lower courts are in conflict on the underlying constitutional doctrines and need guidance, and this case presents important questions of Federal constitutional law which are critical to the freedom of all Americans to pursue and advance traditional moral values.

SUMMARY OF ARGUMENT

In *Boy Scouts of America v. Dale,* 530 U.S. 640, 644 (2000), this Court held that the Boy Scouts cannot be forced by anti-discrimination laws to accept openly gay adult leaders and members. The freedom of the Scouts, including its subdivision Berkeley Sea Scouts, to choose their own leaders and members is protected by the right of expressive association under the First Amendment. The exact same

reasoning applies to protect the Boy Scout policy regarding atheists.

Yet, it is indisputable that the City of Berkeley penalized the Sea Scouts, and the Boy Scout organization of which they are a part, precisely because the Scouts insisted on reserving their freedom to exercise these exact same constitutional rights recognized by this Court in *Dale*. But under the well-established precedents of this Court, Berkeley may not penalize the Sea Scouts and the Boy Scouts for exercising their constitutional rights, or reserving the right to do so.

This is not a case where the government is simply choosing who and what to subsidize. The Berkeley City government has already chosen to fund free berths at the city marina for organizations just like the Sea Scouts and Boy Scouts. But Berkeley has excluded the Scouts solely because of their exercise of constitutional rights expressly and directly recognized by this Court. The Scouts otherwise meet all the criteria for participation in the program, the benefits of which they have enjoyed for 70 years. Berkeley may not do this under our Constitution.

The decision of the court below builds a trend among the lower courts to fail to protect the constitutional rights of those who believe in traditional moral values from penalties imposed on the exercise of those rights by state and local governments. This has created a conflict among the circuits and other courts over whether government may, indeed, penalize the exercise of constitutional rights.

More fundamentally, this case presents crucial legal issues of national importance, for what is at stake here is the freedom of Americans to join together to defend, advocate, and teach traditional moral and religious values. Millions of

Americans who believe deeply in these values are looking to this Court to uphold their constitutional rights and equal treatment under the law.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT HOLDING THAT GOVERNMENTS MAY NOT PENALIZE CITIZENS FOR EXERCISING THEIR CONSTITIONAL RIGHTS.

In *Boy Scouts of America v. Dale,* 530 U.S. 640, 644 (2000), this Court said, "The Boy Scouts is a private, not for profit organization engaged in instilling its system of values in young people. The Boy Scouts assert that homosexual conduct is inconsistent with the values it seeks to instill." The Court also said, "The Boy Scouts asserts that it 'teach[es] that homosexual conduct is not morally straight'... and that it does 'not want to promote homosexual conduct as a legitimate form of behavior,'..." 530 U.S. at 651.

In that case, the Boy Scouts dismissed James Dale as an adult scout leader because he had become an openly public, gay activist. Dale sued claiming discrimination under the state's public accommodations law, and the New Jersey Supreme Court upheld Dale's claim, ordering the Boy Scouts to reinstate him.

But this Court reversed. The Court held that applying the New Jersey discrimination law to the Boy Scouts in this way would violate the organization's right to expressive association under the First Amendment.

The Court explained that the First Amendment protects the right of the Boy Scouts to choose and send the messages it desires, and to express and teach the values in

which it believes. The Court recognized that forcing the Boy Scouts to accept publicly avowed, practicing homosexuals as members and adult leaders would nullify its message, teachings, and expression regarding traditional moral values and sexual conduct. As the Court said,

> "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express....
>
> The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."

530 U.S. at 648.

The same points apply to the Boy Scout policy regarding atheists. The Boy Scouts wish to instill in boys the value that it is important to believe in God. *Randall v. Orange County Council,* 17 Cal.4th 736, 741-742 (1998). If the Boy Scouts are forced to admit as members and adult leaders individuals who openly express that they do not believe in God, then the ability of the Scouts to teach this value will be destroyed. The very membership and leadership of these individuals would send the message that it is not important to believe in God.

Yet, it is indisputable that the City of Berkeley penalized the Sea Scouts, and the Boy Scout organization of which they are a part, precisely because the Scouts insisted on reserving their freedom to exercise these exact same constitutional rights recognized by this Court in *Dale.* The City demanded that the Sea Scouts provide a statement proclaiming as a matter of organizational policy that they

would never exercise these constitutional rights. The Sea Scouts tried to placate the City in various ways, but in the end they did not provide such a statement, because of their fealty to the national policies of the Boy Scout organization. It cannot be denied that it was precisely because of this refusal to provide the statement promising to never exercise these constitutional rights that the City then refused to allow the Sea Scouts continued free use of the berths which they had enjoyed going back all the way to the 1930s, when the Scouts contributed to the very building of the berths and the marina.

Indeed, the court below says precisely this over and over again. The court said,

> "But here there is no dispute the basis for the city council's action was…BSA's 'discriminatory policies against gays and atheists,' which…made it impossible for the Sea Scouts to give a complete and unambiguous guaranty against future discrimination."

App.A-27. The court also said,

> "The city asked for full assurances that the program posed no threat of future discrimination, but it did not receive them. In light of BSA's policies, which, as counsel conceded in this court, [the Sea Scouts] would have to follow, Berkeley reasonably concluded that the Sea Scouts' representations were inadequate to assure future compliance with the city's nondiscrimination rules."

App.A-26. In its own conclusion, the court said, "Berkeley discontinued the Sea Scouts' berth subsidy because the program was unable, consistent with the enforced policies of BSA, to provide adequate assurances of future

nondiscrimination." App.A-28. The court also said that Berkeley denied

> "a subsidy to a BSA program that refused to state an unambiguous local policy of nondiscrimination, instead pointedly reserving the right to discriminate against openly gay and atheistic participants."

App.A-25. App.A-9("Berkeley reasonably concluded the Sea Scouts did not and could not provide satisfactory assurances because of their required adherence to BSA's discriminatory policies."); App.A-24("In the April 8 letter, the Sea Scouts, in effect, reserved the right to discriminate against avowedly gay or atheistic participants"); App.A-21 to A-22; App.A-26 to A-27.

But under the well-established precedents of this Court, Berkeley may not penalize the Sea Scouts and the Boy Scouts for exercising their constitutional rights, or reserving the right to do so. As this Court said in *Perry v. Sinderman,* 408 U.S. 593, 597 (1972),

> "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' Such

> interference with constitutional rights is impermissible."

(quoting *Speiser v. Randall,* 357 U.S. 513 (1958).

Similarly, in *Thomas v. Review Board* 450 U.S. 707, 716 (1981), this Court said, "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." In *Speiser*, this Court said that for a state government to "deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for such speech. The appellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech" 357 U.S. at 518.

The Court applied this doctrine of unconstitutional conditions in *Healy v. James*, 408 U.S. 169 (1972). A Connecticut state college denied official recognition and access to university facilities to a student organization because it was affiliated with the national Students for a Democratic Society (SDS), allegedly a subversive organization. The Court held this action unconstitutional as it violated the First Amendment's right of freedom of expressive association. The Court said, "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." 408 U.S. at 181. The Court also said,

> "The Constitution's protection is not limited to direct interference with fundamental rights....Freedoms such as these are protected not only against heavy handed frontal attack, but also from being stifled by more subtle government interference."

Id. at 183 (citations omitted).[2]

In addition, in *Bd. of Comm'rs, Waubensee County v. Umbehr,* 518 U.S. 668 (1996), this Court said, "our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected… freedom of speech' even if he has no entitlement to that benefit." Id. at 674. The Court also said, "constitutional violations may arise from the deterrent, or chilling, effect of governmental [policies] that fall short of a direct prohibition against the exercise of First Amendment rights." Id.

This Court recently explained an important distinction in the unconstitutional conditions doctrine in *Rumsfeld v. Forum for Academic and Institutional Rights,* 126 S.Ct. 1297 (2006). It stated that "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." 126 S.Ct.at 1307. That case involved the Solomon Amendment, which required colleges and universities receiving Federal funds to provide military recruiters equal access to recruiters from other potential employers on campus. The Court held,

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[2] The court below quite wrongly stated that *Healy* actually supports Berkeley's action in this case, App.A-24. It referenced *Healy* as saying "the government could legitimately demand assurances that an individual or group would not engage in the same prohibited activities as the larger organization with which the individual or group was associated…. Specifically, the high court held that a local Students for a Democratic Society chapter's 'equivocation' regarding the use of violent and disruptive tactics could warrant denying the group official recognition." App.A-24 to A-25. But the SDS did not have a constitutional right to engage in violent and disruptive tactics. In the present case, however, the Sea Scouts and the Boy Scouts do have a constitutional right expressly recognized by this Court to engage in the conduct for which Berkeley has penalized them.

> "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds."

Id. In other words, since Congress could constitutionally enact a law requiring colleges and universities to grant military recruiters the same access and treatment as other recruiters, even without any federal funds, it certainly could condition receipt of federal funds on providing such equal access and treatment to military recruiters.

But in the present case, Berkeley could not directly impose on the Sea Scouts and the Boy Scouts the requirement that they not exclude avowed gays and atheists. Berkeley is prevented from doing this by the exact holding of this Court in *Dale*. Therefore, Berkeley could not deny the Sea Scouts and the Boy Scouts participation in a program otherwise available to them on the condition that they not exclude avowed gays and atheists.[3]

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[3] For further support for the unconstitutional conditions doctrine see, *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Planned Parenthood Federation of America, Inc. v. Agency for Intern. Development*, 915 F.2d 59 (2d Cir. 1990) *cert. denied* 500 U.S. 92 (1991); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996); *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001); *Anderson v. McCotter*, 100 F.3d 723 (10th Cir. 1996); *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295, 1308 (S.D. Fla. 2001)(School district could not ban Scouts from school facilities due to supposed discrimination because "the School Board cannot punish another group for its own message protected under the First Amendment.").

This is not a case like *Rust v. Sullivan,* 500 U.S. 173 (1991), where the government is simply choosing what to fund, and decides to fund one policy alternative and not another. In the present case, the Berkeley City government has already chosen to fund free berths at the city marina for organizations just like the Sea Scouts and Boy Scouts. But Berkeley has excluded the Scouts solely because of their exercise of constitutional rights expressly and directly recognized by this Court. Berkeley may not do that under our Constitution.

This is also not a case like *Grove City College v. Bell,* 465 U.S. 555 (1984), where a federal statute required colleges to agree not to discriminate on the basis of sex in any program receiving federal funds. This Court held that it was not unconstitutional for the federal government to cut off its funds to Grove City College when the school refused to provide a statement assuring compliance with the ban on sex discrimination. But in that case, Grove City did not have any constitutional right to engage in sex discrimination. Indeed, there was not even an expressive association issue in that case, as Grove City simply sought to resist the federal government asserting control over schools through its education funding. The Court held there that the Constitution did not prevent the federal government from attaching strings to its funding. But in the present case, again the Sea Scouts and the Boy Scouts do have a constitutional right to maintain their policies advancing traditional moral values as expressly and directly recognized by this Court.

In summary, in the present case, the Berkeley city government penalized the Sea Scouts and the Boy Scouts precisely for exercising the exact same constitutional rights recognized by this Court in *Dale.* That penalty took the form of denying participation by the Sea Scouts and the Boy

Scouts in a generally available program for those just like the Scouts, except for the exercise by the Scouts of their recognized constitutional rights. Indeed, the Sea Scouts and the Boy Scouts had enjoyed the benefits of the program for over 70 years until the city government banned them. Under the numerous precedents of this Court discussed above, the Constitution prevents the city government from imposing such a penalty on the exercise of constitutional rights. The decision of the court below upholding that penalty consequently conflicts with the numerous precedents of this Court discussed above.

II. THE DECISION BELOW BUILDS A CONFLICT AMONG THE LOWER COURTS REGARDING THE UNCONSTITUTIONAL CONDITIONS DOCTRINE AND WHETHER THE RIGHTS OF THOSE ADVOCATING TRADITIONAL MORAL VALUES WILL BE RESPECTED.

The decision of the court below builds a trend and a growing conflict in light of the 2nd Circuit decision in *Boy Scouts of America v. Wyman,* 335 F.3d 80 (2d Cir.2003). In that case, the state of Connecticut excluded the Boy Scouts from participating in the state's workplace charitable contribution campaign again because of the exercise by the Scouts of the exact same constitutional right recognized by this Court in *Dale*, exclusion of avowed gays from membership and leadership in the organization. The 2nd Circuit nevertheless allowed the state of Connecticut to impose this penalty on the exercise by the Scouts of this explicitly recognized constitutional rights.

In contrast, in *Gay Lesbian Bisexual Alliance v. Pryor,* 110 F.3d 1543 (11th Cir 1997), a state statute prohibited any college or university from spending public funds to sanction, recognize, or support any group that

promotes a lifestyle or other actions prohibited by sodomy or sexual misconduct laws. The 11th Circuit struck down as unconstitutional this penalty on the exercise of First Amendment rights by the organization to promote the values in which it believes.

Indeed, organizations that promote traditional moral values are so disfavored that even the rights of the truly reprehensible Ku Klux Klan are better protected in the circuit courts. *Robb v. Hungerbeeler,* 370 F.3d 735 (8th Cir. 2004), *cert. denied, sub. nom. Rahn v. Robb,* 543 U.S. 1054 (2005)(state of Missouri could not exclude local unit of the Ku Klux Klan from the state's Adopt-A-Highway program because of the Klan's racially restrictive membership policy); *Cuffley v. Mickes,* 208 F.3d 702 (8th Cir. 2000), *cert. denied, sub. nom. Yarnell v. Cuffley,* 532 U.S. 903 (2001); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd.,* 578 F.2d 1122 (5th Cir. 1978) (School Board decision to deny Klan use of a high school gym for a Saturday night meeting because of the Klan's racially discriminatory practices was overturned).

Consequently, the decisions of the court below and of the 2nd Circuit in *Wyman* are in conflict with the above decisions of the 11th Circuit,the 8th Circuit, the 5th Circuit, and all of the decisions of this Court discussed above. This pattern of decisions shows a particular bias against those who wish to advocate traditional moral values. We urge the Court to take this case to clear up this confusion and ensure that the rights of those who wish to advocate traditional moral values are respected and protected as much as those of anyone else.

III. THIS CASE PRESENTS CRITICAL ISSUES OF ONGOING NATIONAL IMPORTANCE CONCERNING THE FREEDOM OF AMERICANS TO JOIN TOGETHER TO ADVOCATE TRADITIONAL MORAL AND RELIGIOUS VALUES.

What is at stake in this case is the freedom of Americans to join together to defend, advocate, and teach traditional moral and religious values. Their conduct in forming organizations to express such viewpoints is increasingly labeled as discrimination. If they try to hold such organizations together by only choosing as leaders and members those who believe in such values, they are increasingly told by their government that this amounts to a violation of local anti-discrimination laws, or at least that what they are doing is so socially unacceptable that they must be excluded from government programs and activities, and the public square.

As a result, the University of California's Hastings School of Law denied official recognition and funding to a Christian student club because it requires its members to sign a statement of faith and to follow Christian sexual morality, including non-participation in homosexual conduct. Organizations promoting homosexual conduct, however, are fully recognized and funded by the school. The Federal District Court for Northern California recently upheld the school's action. *Christian Legal Society v. Kane,* No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006).

In Oregon, a public school barred the Boy Scouts from making informational presentations on school grounds because of its "discriminatory" policies regarding atheists and gays, even though other community organizations with different beliefs were allowed to do so. A state appellate

court has upheld that school's action. *Powell v. Bunn,* 108 P.3d 37 (Or. Ct. App. 2005).

In San Diego, because of the religious values of the Scouts, a Federal district court has held unconstitutional a lease of parkland to the Scouts for the building and maintenance at Scout expense of a first class campground open to the general public on an equal basis. *Barnes-Wallace v. Boy Scouts of America,* 275 F. Supp. 2d 1259 (S.D. Cal. 2003).

In Connecticut, the Boy Scouts are banned from the state employee charitable workplace campaign because they are a "discriminatory" organization for teaching traditional moral values to boys concerning belief in God and sexual conduct. But remaining as participants in good standing in the charitable campaign are organizations expressing quite opposite views, such as the Stonewall Foundation, the Lambda Legal Defense and Education Fund, and Parents, Families & Friends of Lesbians and Gays. As discussed above, the 2nd Circuit has upheld this state action. *Wyman.*

In New York, a college Christian group was told it was in violation of anti-discrimination requirements because it would not accept non-Christians as officers of the organization. The students had to arrange a lawsuit to get their constitutional rights enforced. *Hsu v. Roslyn Union Free School Dist. No. 3,* 85 F. 3d 839 (CA2), *cert denied,* 519 U.S. 1040 (1996).

In Broward County, Florida, the school board banned the Scouts from the public schools on the grounds that they were a discriminatory organization for upholding traditional moral values regarding homosexual conduct. It took a lawsuit by the Scouts to get their clear constitutional rights respected by local school officials. *Till, supra.*

And in the present case, nonprofit groups are allowed to berth their boats rent free at the Berkeley city marina. But not the Boy Scouts, who contributed the basic building blocks of the marina 70 years ago.

See, Thomas C. Berg, *Religious Liberty in America at the End of the Century,* 16 J.L. & Religion 187 (2001); Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on Equal Access for Religious Speakers and Groups,* 29 U.C Davis L. Rev. 653 (1996); Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act,* 21 J.C. & U.L. 369 (1994).

The Boy Scouts of America is an organization run by parents and local community volunteers coming together to instruct young boys in the traditional moral values in which they believe. These values include the importance of maintaining faith in God and belief in traditional sexual morality. To call this activity discrimination is overheated hyperbole by those who simply oppose these traditional moral beliefs. The Boy Scouts do not discriminate. They engage in the teaching of traditional moral values, a constitutionally protected activity that a state may not prohibit or penalize.

Those with different beliefs have constitutionally protected rights to start their own youth organizations teaching their preferred moral values. But they may not use the power of the state to impose their values and beliefs on those who disagree. This is an untenable result that has no roots in the will of the people.

If, because of their traditional values, the Boy Scouts are a discriminatory organization that can be penalized for exercising their constitutional rights, then what will happen in the future to Catholic schools and their youth groups because of their teachings and practices? What will happen to schools and youth groups sponsored by evangelical Protestant churches? Most directly threatened are the many organizations that have sprung up across the country to advance traditional moral values. If the Court does not address these issues now, the problem will fester and grow, causing greater and greater social discord.

Millions of Americans who believe in traditional moral and religious values are looking to this Court to uphold their constitutional rights and equal treatment under the law. For these reasons, the decision of the court below merits review.

CONCLUSION

For all of the foregoing reasons, *Amici Curiae* The American Civil Rights Union and Congressman Dan Lungren respectfully urge this Court to grant the Writ of Certiorari requested by the Petitioner.

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No. 06-40

In the

Supreme Court of the United States

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY, CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to Supreme Court of California

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Eugene Evans (Evans) files this reply to address the new issues raised in Respondent City of Berkeley's (City or Berkeley) Brief in Opposition (Opp.)

I

THE DAMAGES IN THIS CASE WERE SUFFERED BY EVANS; HE THEREFORE HAS STANDING TO BRING THIS CASE

City claims that the injuries alleged were suffered by a nonparty, the Boy Scouts of America (BSA), not Evans, and therefore Evans has not suffered the "injury in fact" required for Article III standing. Opp. at 9-14. Specifically, City claims that the action sought to recover the described damages to the BSA program, not to any individual participant. Opp. at 8. The First Amended Complaint (Complaint) however, makes plain the injuries in fact were suffered by, and damages sought on behalf of, the individual plaintiffs, including Evans. The Complaint declares that the plaintiffs, including Evans, "sue individually as well as for the benefit of all Berkeley Sea Scout program participants on the interests and issues alleged in this Complaint that are common to them all." Para. 12, App. D-8. No claim is made on behalf of BSA.

Complaint Paragraph 11 sets out the specific injuries.

> Each of the Plaintiffs has suffered injuries as a result of the actions of Defendants. These injuries include, inter alia, the unlawful discrimination against them by the Defendants including interference with and attempted interference with their First Amendment rights of freedom of association and freedom of speech, the threatened loss of the Northland ship to the Boy Scouts of America if plaintiffs complied with the demands of Defendants, loss of membership in the BERKELEY SEA SCOUTS due to an

> inability to pay the $7 membership fee formerly paid by the Skipper EUGENE EVANS who now pays over $500 per month in berth fees, a disintegration of the community outreach program due to a lack of funds, a general disintegration and scaling back of the program due to a lack of funds, a loss of formerly free services and events (such as cruises, meals, beverages and overnight camping trips) formerly paid for by the Skipper EUGENE EVANS who can no longer afford them, a diminished use of the Farallon ship for cruises due to a lack of funds, the threatened loss of maritime liability insurance made available at a greatly reduced rate from the Boy Scouts of America if plaintiffs complied with the demands of Defendants, and the continuing loss each month for berth fees of over $500 per month at this time.

App. D-6-D-7.

All of these injuries are those of the individual Sea Scouts, and particularly Petitioner Evans who is now paying for the formerly free berth fees, *id.*, and not of BSA. (As the court below noted, BSA provides the Sea Scouts with a low-cost maritime liability insurance policy but gives it no direct funding. App. A-2-A-3.) All of these allegations of injury are incorporated into the Fifth Cause of Action for Violation of Constitutional Rights. App. D-48.

City claims the free berth benefit was issued to BSA's Mount Diablo Council under the City Council's 1989 resolution, citing its App. F. Opp. at 7. In fact, App. F shows the resolution was adopted June 28, 1969, not 1989. More recent documentation in App. K, Minutes of May 5, 1998, shows the action of the City Council was to deny free berths to the Sea Scouts, not BSA.

See also, the City Attorney Opinion concluding that the Berkeley Sea Scouts do not qualify as an organization entitled to free berths under City Council's policy. App. J-6. These City records make clear that the applicants for the continuing free berth benefits were the Sea Scouts, rather than BSA.

City attempts to support its attack on Evans' standing by citing, Opp. 9-10, 27, to *DaimlerChrysler Corp. v. Cuno*, ___ U.S. ___, 126 S. Ct. 1854 (2006). City neglects to note that this was a taxpayer standing case in which this Court held that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." *Id.* at 1864. The present case, of course, is not a taxpayer case, but one of direct out of pocket injury in fact to Evans.

Evans, in sustaining the damages noted above, has met the tripartite test as set forth in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1998). These include injury in fact, the cost of personally paying the formerly free berth fees among other harm, causation by the City in its revocation of the free berths formerly provided to the Sea Scouts, and redressability through repayment of those fees and other damages, *see* App. D-6-D-7, D-53-D-54.

II

CITY'S CONDUCT IN REVOKING THE FREE BERTHS CONSTITUTED VIEWPOINT DISCRIMINATION AND VIOLATION OF FREEDOM OF ASSOCIATION

A. City Concedes That Evans and BSA Have the Same Viewpoint

City argues that Evans has no standing to raise the issues of freedom of association and viewpoint discrimination. City claims that City's policy supports and does not burden Evans' viewpoint since he favors the inclusion of gays and atheists in

the Sea Scouts. Opp. at 21-23. City then contradicts this argument by stating that the Sea Scouts and BSA were "one and the same" with respect to the discrimination at issue. Opp. at 17. City further notes the California Supreme Court finding that the Sea Scouts could not, consistent with BSA limitations imposed on them, state that they would not discriminate against gays and atheists. *Id.* (citing App. A-20).

What is at issue here is City's action in revoking free berthing for the Sea Scouts because of their relationship to BSA and the ensuing damages to Evans and the Sea Scouts he represents. The viewpoint of Evans at issue here is his adherence to BSA doctrines. As City points out, Opp. at 17, Evans' and BSA's viewpoint is "one and the same" with regard to the policy on homosexuality and atheism. If it were not so, that is, if the Sea Scouts had agreed to a policy that would have put them at odds with the BSA policy, there would be nothing to litigate because Berkeley would not have excluded the Sea Scouts from the free-berthing program.

Further, the activities of Evans in promoting the skills associated with sailing in this context are indeed expressive activity. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649-50 (2000), found expressive activity included teaching such skills as camping, archery, and fishing. Further, "the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.* at 650. The City denied free berths to the Sea Scouts on the basis that they were associated with BSA. App. A-6-A-7. In seeking to separate Evans and the Sea Scouts from BSA, the City violated these rights of expressive association.

B. City Has Shown No Compelling Interest in Infringing on Petitioner's Viewpoint

City criticizes Evans' "gratuitous references to 20 U.S.C. § 7905, 42 U.S.C. § 5309 and sections of the California Government and Revenue and Taxation Codes" claiming that "[n]one of the cited section[s] have ever been at issue in this case before any court, including the California Supreme Court." Opp. at 21 n.2. City claims "Evans' reference to them is improper and should be disregarded." *Id.* City's claim is incorrect. As City must be aware, Evans cited and relied on most of these sections in his Petitioners' Opening Brief on the Merits in the California Supreme Court as follows: 20 U.S.C. § 7905 at 28; Cal. Gov't Code § 53077.5(b) and (a)(5) [mistakenly cited as (b)(5) in the Petition] at 31; Cal. Rev. & Tax. Code § 214(a) at 31; and Cal. Rev. & Tax. Code § 6361(b)(3) at 32. Evans did not cite therein 42 U.S.C. § 5309(e) which was enacted December 30, 2005, P.L. 109-148, 119 Stat. 2680, after briefing in the California Supreme Court was completed. Evans cites these sections here for the same reason he cited them to the lower court, that is, to show that the Boy Scouts, including its subsidiaries such as the Sea Scouts, are federally and state recognized charitable organizations that are statutorily approved.

Moreover, these statutes are fundamentally important to demonstrate that Berkeley's viewpoint discrimination, infringing on the First Amendment and on Equal Protection, is not justified and permitted by a compelling state interest. This Court, in *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983), made it clear that viewpoint discrimination, in the sense of withholding a generally available benefit or subsidy on the basis of an organization's expressive activity, can be allowed only where "there can be no doubt that the activity involved is contrary to *a fundamental public policy.*" (Emphasis added.) In *Bob Jones*, this Court recognized the long-established "fundamental national public policy," embraced by all three

branches of the federal government, of opposition to race-based discrimination. *Bob Jones Univ.*, 461 U.S. at 593. Likewise, with reference to the sex-based discrimination at issue in *Grove City Coll. v. Bell*, 465 U.S. 555 (1984) (cited by the City, Opp. at 24, 25), Title IX's promotion of women athletics arguably evidences a fundamental national policy that would justify viewpoint-based discrimination in public subsidies in that context.

There is no such "fundamental national public policy" at odds with the Boy Scouts or the BSA viewpoints that trigger Berkeley's discrimination against the Sea Scouts. To the contrary, the Boy Scouts have been honored by the federal government as a federally chartered organization (*see Marcella v. Brandywine Hosp.*, 47 F.3d 618, 624 (3d Cir. 1995)), and they enjoy tax-exempt status under both the federal code (*see* I.R.S. Publication 78, Cumulative List of Organizations, listing 501(c)(3) organizations) and California state law (*see* Cal. Rev. & Tax. Code § 214(a)).

Indeed, Congress' enactment in 2005 of 42 U.S.C. § 5309(e), withholding certain federal funds from any locality that would deny equal access to public facilities for the Scouts, is of even greater significance in the wake of Justice Kennedy's recent stay in the case of the Mt. Soledad memorial in San Diego County. Noting that Congress had acted to attempt to spare the memorial from court-ordered demolition, Justice Kennedy wrote: "Congress' evident desire to preserve the memorial makes it substantially more likely that four Justices will agree to review the case in the event the Court of Appeals affirms the District Court's order." *San Diegans For the Mt. Soledad Nat'l War Mem'l v. Paulson*, 126 S. Ct. 2856, 2858 (2006). If Congress' weighing in on behalf of the Mt. Soledad memorial increased the likelihood of an eventual hearing by this Court, then Congress' legislating to guarantee equal access for the Boy Scouts should be regarded as an argument for granting

certiorari in this, a case challenging denial of equal access to a Scouting affiliate.

C. Viewpoint Bias Is Barred Even in a Nonpublic Forum

Berkeley contends that Evans has denied that this is a "public forum" case. Opp. at 26, n.3. While Evans counsel, at argument before the California Supreme Court, did agree that the free-berthing program is not a public forum, this applies only to an *unlimited* public forum. In contrast, a program to facilitate the sailing activities of nonprofit organizations constitutes a quintessential *limited* public forum. Indeed, this is consistent with the teaching of this Court that recreational activities—such as "the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Dale*, 530 U.S. at 650 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984)).

In any case, viewpoint bias is barred even in a *nonpublic* forum. Government needs only reasonable grounds for restrictions in a nonpublic forum, but they must be "reasonable . . . and . . . *viewpoint neutral*." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (emphasis added). Therefore, regardless of the category of the forum at issue, Berkeley has transgressed by engaging in viewpoint discrimination.

III

CITY'S DENIAL OF EQUAL ACCESS TO ITS PUBLIC FACILITY WAS DENIAL OF A PUBLIC BENEFIT, NOT A SUBSIDY

City misquotes the Petition as stating that " 'no other subsidy applicant was required to submit a letter' such as the April 8, 1998 letter. Petition p.19." The sentence in fact reads:

"No other free-berth applicant at the Berkeley Marina was required to submit such a letter." Petition at 19. The distinction is important. This Court has never considered equal access to public facilities for the purpose of expressive activities to be a "subsidy." Rather, it has recognized that equal access to government facilities is more properly characterized as a government benefit that cannot be denied on the basis of activity protected by the First Amendment. In *Healy v. James*, 408 U.S. 169 (1972), this Court found that "the primary impediment to free association flowing from nonrecognition [was] the denial of use of campus facilities for meetings and other appropriate purposes." *Id.* at 181. The recent case of *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, ___ U.S. ___, 126 S. Ct. 1297 (2006) characterized *Healy* as holding that it is unconstitutional to "impose penalties or withhold *benefits* based on membership in a disfavored group." *Id.* at 1312 (emphasis added). This Court noted the distinction in the grant of funds by government, a subsidy, and "allocating public benefits, such as access to a school auditorium or a municipal theater" in *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), or the second class mailing privileges available to "'all newspapers and other periodical publications,'" in *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 148 n.1 (1946). Granting similar nonprofit public benefit organizations free access to public facilities is a public benefit, not a subsidy.

For this reason, City's and the court below's reliance on cases providing for actual funding or subsidies is incorrect. Those cases can be described as involving a subsidy in that they involved a payment of government funds or the provision of a tax exemption. Thus, the issue of *Locke v. Davey*, 540 U.S. 712 (2004), was the payment of state funds for religious studies; *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003),

involved federal funds to improve internet communications; *Finley*, 524 U.S. 569, involved federally funded grants to artists; and *Rust v. Sullivan*, 500 U.S. 173 (1991), involved federal funds for a counseling program that was intended to provide a government message to patients. Here, Berkeley was not providing funds to Evans or the Sea Scouts. It had been merely granting them access to use of the Marina on the same basis it provides to other nonprofit organizations.

City purports to quote Evans as conceding "that a funding condition is permissible 'when the government institutes a program or subsidy as an instrument of its own message or to perform governmental functions.' Petition p.13." Opp. at 27. The Petition does not contain this language. Rather, it notes "the very specific situation where the government has established a program or a funding arrangement by which the government '*itself* speak[s] or subsidize[s] transmittal of a message.' Petition at 13, citations omitted." The City cannot pretend it is speaking itself or subsidizing transmittal of messages of nondiscrimination by the Nautilus Institute, Cal Sailing Club, and the Berkeley Yacht Club, those organizations to which it granted free berths. App. D-21. Rather, it is merely providing for recreational opportunities in the Berkeley Marina. City is thus in the same position as that of the government in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), which held that the government could not condition grants to lawyers for indigent clients on their agreement to refrain from challenging the constitutionality of welfare laws, since the grant program was not designed "to promote a governmental message." *Id.* at 534.

This is not a case where private actors are stepping into the City's shoes and performing, as contractors, government functions such as street sweeping, garbage collection, or some other activity serving the public generally. Each of the non-profit organizations that has received free berthing since the policy was adopted—the Berkeley Yacht Club, the Cal Sailing

Club, the Nautilus Institute, and the Berkeley Sea Scouts (App. D-21)—has its own purpose for using the Marina and its own members and defined constituency. None is a general-service organization operating as a public contractor or an intermediary between the city and the general public.

For this reason, the free-berthing-for-non-profits program must be recognized as a program and benefit *for non-profit organizations*—allowing such organizations to use a city facility for their own organizational purposes. It follows that Berkeley's decision as to whether to grant or deny a non-profit organization equal access to this program must be analyzed in the light of this Court's precedents forbidding viewpoint discrimination and ideological considerations in making public facilities, programs, or benefits available. Berkeley fails this test.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court grant the Petition and hear the important First Amendment and Equal Protection issues raised by this case.

DATED: September, 2006.

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EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF BOY SCOUTS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Boy Scouts of America ("Boy Scouts") hereby respectfully moves, pursuant to Rule 37.2 of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari. Petitioner has consented to the filing of this brief in a Consent to File *Amicus Curiae* Briefs filed with this Court on July 24, 2006. Respondent, however, would not consent without first being able to approve the content of Boy Scouts' brief.

As more fully explained in the attached brief, after this Court recognized that the First Amendment protects Boy Scouts' expressive leadership policies from governmental interference, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), Boy Scouts has been subjected to repeated attacks by government entities and others who disapprove of Boy Scouts' expression, *e.g.*, *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004); *Winkler v. Chicago School Reform Board of Trustees*, No. 99C2424, 2005 WL 627966 (N.D. Ill. Mar. 16, 2005), 382 F. Supp. 2d 1040 (N.D. Ill. 2005), *argued sub nom. Winkler v. Rumsfeld*, No. 05-3451 (7th Cir. Apr. 6, 2006); *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003), *argued*, Nos. 04-55732, 04-56167 (9th Cir. Feb. 14, 2006); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001).

Boy Scouts is the organization most directly affected by the California Supreme Court's decision at issue in this case and, therefore, has a vital interest in this Court's

consideration of the petition. Boy Scouts also is uniquely capable of assisting the Court in understanding the danger to the freedoms of speech and association posed by the decision below and the other cases pending in the lower courts.

For the reasons stated above, Boy Scouts respectfully requests that this Court grant this motion for leave to file the attached *amicus curiae* brief.

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Boy Scouts of America ("Boy Scouts"), as *amicus curiae*, supports granting the petition for a writ of certiorari and reversal of the judgment of the California Supreme Court entered in this case. 38 Cal. 4th 1, 129 P.3d 394 (2006).[1]

INTEREST OF THE *AMICUS CURIAE*

Boy Scouts of America is "a private, not-for-profit organization engaged in instilling its system of values in young people." *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000). More than three million youth members and one million adult leaders are active in the traditional programs of Cub Scouting, Boy Scouting, and Venturing. Venturing is a coeducational program for young adults between the ages of 14 and 21. Sea Scouting is a program within Venturing that promotes better citizenship through learning boating skills and America's maritime heritage.

All Boy Scouts and their adult leaders agree to follow the Scout Oath and Law,[2] which embody traditional values. *See Dale*, 530 U.S. at 649. The Scout Oath includes the obligations to do one's "duty to God" and to be "morally

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[1] Counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] The Scout Oath states that "On my honor I will do my best / To do my duty to God and my country / and to obey the Scout Law; / To help other people at all times; / To keep myself physically strong, / mentally awake, and morally straight." *Dale*, 530 U.S. at 649. The Scout Law provides that a Scout is "Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent." *Id.*

straight." *Id.* In adhering to these values, Boy Scouts does not accept as members atheists or agnostics, *see Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1268 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993); *Randall v. Orange County Council, Boy Scouts of America*, 952 P.2d 261, 264-65 (Cal. 1998), or avowed homosexuals, *see Dale*, 530 U.S. at 653-54; *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 224-25 (Cal. 1998).

Since this Court confirmed Boy Scouts' First Amendment rights six years ago, Boy Scouts has been defending itself against attacks by government entities and individuals who disapprove of Boy Scouts' expression. *E.g.*, *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001). Two appeals are currently pending in the courts of appeals. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003), *argued*, Nos. 04-55732, 04-56167 (9th Cir. Feb. 14, 2006); *Winkler v. Chicago School Reform Board of Trustees*, No. 99C2424, 2005 WL 627966 (N.D. Ill. Mar. 16, 2005), 382 F. Supp. 2d 1040 (N.D. Ill. 2005), *argued sub nom. Winkler v. Rumsfeld*, No. 05-3451 (7th Cir. Apr. 6, 2006). *See generally* Erez Reuveni, Note, *On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 B.U. L. Rev. 109, 114-20 (2006).

The instant case concerns a decision of the California Supreme Court to affirm dismissal of a complaint filed by members of Boy Scouts active in Sea Scouting in Berkeley, California, despite a public record replete with evidence of viewpoint discrimination against the Scouts. The Berkeley

Sea Scouts are a group of citizens teaching youth Scouting values through sailing activities in the Berkeley marina. (App. A-2, D-4-D-5.)[3] Until recently, the Berkeley Sea Scouts had used berth space free of charge in the City marina without incident for more than 60 years. (App. A-3, D-8-D-11.)

The City of Berkeley adopted a resolution in March 1997 granting free berth space in the City's marina to nonprofit groups that "supply a beneficial public service" and demonstrate that the benefit of their activities "greatly exceeds the value of the berth." (App. A-4.) The resolution provides that the organizations "demonstrate . . . that they promote cultural and ethnic diversity." (App. A-4.) The resolution further states that

> The Berkeley Marina advocates and practices equal opportunity in terms of access to its berthing facilities. Availability and use of the facilities will not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition.

(Resolution No. 58,859 N.S.; *see* App. A-4.)

Under this policy, the City granted free berthing to the Berkeley Sea Scouts, the Berkeley Yacht Club, the Cal Sailing Club, the Nautilus Institute, and the Bay Area Association of Disabled Sailors. (App. D-21; Res. Nos. 59,986-N.S. (1999), 60,747-N.S. (2000), 61,774-N.S.

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3. Numbers preceded by "App." refer to pages in the appendix bound with the petition for a writ of certiorari.

(2002).) The Cal Sailing Club's Women's Sailing Clinic is a "special 'women teaching women'" program that limits access based on "sex."[4] The Nautilus Institute operates a program for "teenage public school students" that predicates access on "age."[5] And there can be little dispute that the Bay Area Association of Disabled Sailors focuses its services on those with a "disability or medical condition." The City has never questioned the propriety of the berthing space for these groups.[6]

Following the California Supreme Court's 1998 decision in *Curran*, a case factually similar to *Dale* resolved under state law, the City punished the Berkeley Sea Scouts for affiliation with Boy Scouts by revoking their free use of berth space in the City marina. (App. A-7, D-25.) The City Council recognized that the Berkeley Sea Scouts program made "enormous contributions to the community." (App. D-24.) Nevertheless, the City Council excluded the Berkeley Sea Scouts from participating in the berthing program "due to" Boy Scouts' policies. (App. A-6.) For Boy Scouts, speech is no longer free in Berkeley.

City officials targeted the Berkeley Sea Scouts on the theory that the Berkeley Sea Scouts violated a City ordinance (distinct from the resolution) prohibiting the City from discriminating against persons seeking access to the City

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[4] *See* http://cal-sailing.org/bottle/2002/Aug.html (last visited Sept. 8, 2006).

[5] *See* http://nautilus.org/archives/pegasus/ (last visited Sept. 8, 2006).

[6] The Berkeley Sea Scouts were unable to fully explore this evidence because their complaint was dismissed before discovery.

marina and other City facilities and services (App. D-11-D-20). In a peculiar reading of the law, the City determined that the ordinance required it to discriminate against the Berkeley Sea Scouts and exclude them from the program. (App. D-21-D-25.)

Certain City Councilmembers "made clear" that they wanted to take 'punitive actions' against the Sea Scouts in an 'attempt to overturn [Boy Scouts'] national policies.'" (App. A-24 n.10; *see* App. D-19.) The Chair of Berkeley's Waterfront Commission and other City Councilmembers stated that the City was excluding the Berkeley Sea Scouts "in order to retaliate against the national Boy Scouts of America organization for having declined Timothy Curran's application to become a Scoutmaster." (App. D-24; *see* App. A-24 n.10.) Another Councilmember went so far as to state that, in order to keep the free berth space, the Berkeley Sea Scouts should change Boy Scouts' policy to make it "explicit that they are willing to recruit homosexuals and atheists."[7]

The City informed the Berkeley Sea Scouts by letter dated May 21, 1998, that they had been excluded from the berthing program because they "were associated with the national Boy Scouts of America." (App. D-25.)

REASONS FOR GRANTING THE PETITION

This case presents a First Amendment issue of national importance: May a government exclude an otherwise eligible organization from participating in a

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[7] Video tape: City of Berkeley City Council Meeting (May 5, 1998) (on file with author).

generally available government forum or program because of the organization's expression?

The California Supreme Court's decision infringes First Amendment principles of free speech and association. The decision is part of a growing pattern of government actions and lower court decisions that have excluded the Boy Scouts and traditional religious groups from government facilities and programs open to a variety of groups because of their views and related membership requirements with respect to religious belief, morality, and sexual conduct.

Furthermore, the California court's decision is in direct conflict with this Court's precedents, *see, e.g.*, *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831-32 (1995), and is one of a number of lower court cases reaching inconsistent results. *Compare Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006) (preliminarily enjoining Southern Illinois University School of Law from excluding the Christian Legal Society from the ranks of recognized student groups), *with Christian Legal Society Chapter of University of California, Hastings College of the Law v. Kane*, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006) (upholding the decision of Hastings College of Law to exclude Christian Legal Society from the ranks of recognized student groups), *appeal docketed*, No. 06-15956 (9th Cir. May 23, 2006).

Finally, the California court's decision is inconsistent with this Court's decisions holding that government may not condition an otherwise-available benefit on abandonment of First Amendment rights. *See, e.g., Board of County Commissioners v. Umbehr*, 518 U.S. 668, 674 (1996); *Rutan*

v. Republican Party of Illinois, 497 U.S. 62, 77-78 (1990); *Speiser v. Randall*, 357 U.S. 513 (1958).

I.
THIS CASE PRESENTS A RECURRING FIRST AMENDMENT ISSUE OF NATIONAL IMPORTANCE

Under the California Supreme Court's decision, state and local governments are free to punish the Boy Scouts for its views. The decision puts at risk the First Amendment rights of all expressive associations – especially religious groups – to adhere to their moral convictions without being "select[ed] for disfavored treatment" at the hands of government. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831 (1995).

The California court's decision is one of several pending matters involving the Scouts.

1. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1263 (S.D. Cal. 2003), *argued*, Nos. 04-55732, 04-56167 (9th Cir. Feb. 14, 2006). Boy Scouts developed on City parkland and operated at no cost to the City of San Diego a campground and an aquatic center open to all San Diego youth groups. Notwithstanding that the City has similar nominal-rent leases of City land with over 100 nonprofits – including churches – the district court revoked Boy Scouts' leases under the Establishment Clause. Boy Scouts' appeal to the Ninth Circuit is awaiting decision.

2. *Winkler v. Chicago School Reform Board of Trustees*, No. 99C2424, 2005 WL 627966 (N.D. Ill. Mar. 16, 2005), 382 F. Supp. 2d 1040 (N.D. Ill. 2005), *argued sub nom. Winkler v. Rumsfeld*, No. 05-3451 (7th Cir. Apr. 6, 2006). The district court held that the Department of

Defense violated the Establishment Clause by supporting the National Scout Jamboree, an event held every four years at Fort A.P. Hill in Fredericksburg, Virginia. The Jamboree is a national, civic, patriotic event attended by Presidents and other government officials. The military views the Jamboree as a unique training opportunity to assist in the erection, support, and dismantling of a temporary "tent city" of 40,000 Scouts and their adult leaders for a ten day period. The district court concluded, based on the district court's decision in *Barnes-Wallace*, that Boy Scouts' "duty to God" requirement rendered Boy Scouts a religious organization and invalidated the support under the Establishment Clause.

3. *City of Philadelphia.* In Philadelphia, over 75 community organizations have $1-a-year leases from the City, including Boy Scouts and several religious groups. The City recently threatened Boy Scouts with eviction because of its constitutionally-protected membership requirements. The City gave Scouts an ultimatum of changing its internal membership policies, paying market rent, or vacating the building that Boy Scouts constructed in 1930 on City property. *See* Tina Moore, *City Poised to Evict Boy Scouts Council*, Philadelphia Inquirer, July 23, 2006.[8]

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8. Two cases that have concluded are in conflict. In *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004), the State of Connecticut excluded Boy Scouts from a charitable campaign in which 900 groups of all different kinds participate solely because of Boy Scouts' constitutionally-protected views and leadership policies. Boy Scout councils had participated in the campaign for 30 years. The Second Circuit recognized that the Boy Scouts' policies were "constitutionally protected" but nonetheless upheld the notion that Boy Scouts should "pay[] a price" for "exercising its First Amendment rights." *Id.* at 95 n.8. In *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001),

The significance of the California Supreme Court's decision extends far beyond its impact on the Boy Scouts. Government officials of all kinds – state officers, public university officials, school boards – are excluding religious and other groups from access to programs on account of their religious or moral values and their efforts to maintain their distinctive identities. *See* Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 369-70 (1994).

1. *Christian Legal Society.* A divided panel of the Seventh Circuit preliminarily enjoined Southern Illinois University School of Law from revoking the Christian Legal Society's status as a recognized student organization because of its views on sexual morality and attendant membership requirements. *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). In contrast, a district court in California recently applied the California Supreme Court's decision in *Evans*, on petition here, and *Wyman*, to deny recognition to the Christian Legal Society chapter at Hastings Law School. *Christian Legal Society Chapter of University of California, Hastings College of the Law v. Kane*, No. C 04-04484 JSW,

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Boy Scout groups in Broward County had been permitted to make use of public school facilities after-hours for many years. But, after *Dale*, "the School Board . . . concluded that *the Scouts are ineligible to rent and lease school facilities like any other private group* because the Scouts' membership policies" violated the School Board's anti-discrimination policy. *Id.* at 1297 (emphasis added). The district court entered a preliminary injunction against the school board. The injunction was later converted to a permanent injunction on consent.

2006 WL 997217 (N.D. Cal. Apr. 17, 2006), *appeal docketed*, No. 06-15956 (9th Cir. May 23, 2006).

2. *Other On-Campus Christian Groups*. The Ninth Circuit recently heard oral argument in *Truth v. Kent School District*, No. 03-cv-00785 MJP (W.D. Wa. Sept. 22, 2004), *argued*, No. 04-35876 (9th Cir. July 27, 2006), in which the district court upheld the right of a public high school to deny recognition to an on-campus Christian club whose membership was limited to Christians. A similar case is pending in the Southern District of California. *Every Nation Campus Ministries at San Diego State University v. Reed*, No. 05-CV-2186 LAB (S.D. Cal. filed Nov. 28, 2005). Several on-campus Christian student groups sued the California State University system after they were denied recognition because their internal membership policies require members to adhere to a Christian statement of faith and code of conduct.

3. *Catholic Charities*. Two states have concluded that Catholic Charities is insufficiently religious to avoid having to include birth control coverage in its health care plan for employees. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal.), *cert. denied*, 543 U.S. 816 (2004); *Catholic Charities of the Diocese of Albany v. Serio*, 808 N.Y.S.2d 447, 28 A.D.3d 115 (N.Y. App. Div. 2006). Similarly, Catholic Charities of Boston recently was pressured to cease doing adoptions rather than change policies to permit adoptions to same-sex couples in violation of Catholic doctrine. *See* Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, Weekly Standard (May 15, 2006).

Too many government officials do not respect the First Amendment rights of dissenting groups as explicated by the Court's decisions in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), *Rosenberger*, and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The California Supreme Court's decision in this case, absent this Court's review, would empower government officials to retaliate against groups whose views and internal membership practices they find objectionable.

II.
THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS FROM THIS COURT AND THE COURTS OF APPEALS

The California Supreme Court's decision conflicts with this Court's decisions forbidding denial of benefits on the basis of viewpoint. *E.g.*, *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831-32 (1995) (viewpoint discrimination to "select[] for disfavored treatment" a student religious publication by excluding it on the basis of its religious character from a forum available to publications); *see Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001) (viewpoint discrimination to exclude club "based on its religious nature" from use of school facilities); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993) (viewpoint discrimination to ban religious group from use of school facilities to show film having a religious perspective).

The California court's decision also conflicts directly with decisions of the courts of appeals. Most recently, in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), the Seventh Circuit ordered a preliminary injunction

to prevent Southern Illinois University School of Law from excluding the Christian Legal Society from among the ranks of recognized student groups. The law school dean had revoked CLS's registered student organization status, stating that the "tenets of the national CLS" violated university anti-discrimination policies. *Id.* at 858. Following *Rosenberger*, the Seventh Circuit recognized that such viewpoint-based exclusion violated the First Amendment and enjoined the exclusion until the district could rule on the merits. *See id.* at 865-67.

Other circuits have also recognized that speakers and expressive associations may not constitutionally be excluded from government programs for no other reason than government disagreement with their viewpoints: *Bowman v. White*, 444 F.3d 967, 973, 983 (8th Cir. 2006) (state university common areas are a designated public forum, so street preacher who used "inflammatory" and "offensive" language was permitted to speak under content neutral policies); *Brown v. California Department of Transportation,* 321 F.3d 1217, 1221-25 (9th Cir. 2003) (highway overpass fences are a nonpublic forum so state's policy of allowing American flags but banning "unpatriotic" messages on fences was neither reasonable nor viewpoint neutral); *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (state's special license plate program facilitated private, rather than government, speech, as to which viewpoint discrimination was impermissible); *Cuffley v. Mickes*, 208 F.3d 702, 712 (8th Cir. 2000) (Ku Klux Klan may participate in state adopt-a-highway program despite federal and state anti-discrimination law because "viewpoint-

based exclusion of a[n] individual or organization from a government program is not a constitutionally permitted means of expressing disapproval of ideas ... that the government disfavors"), *cert. denied*, 532 U.S. 903 (2001);[9] *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1548-50 (11th Cir. 1997) (state law prohibiting any state college or university from spending funds to sanction, recognize, or support any group that promotes homosexuality was viewpoint discriminatory when groups with other viewpoints were allowed to be funded).

Here, the California Supreme Court recognized that "there is no dispute" that the basis for the City's exclusion of the Berkeley Sea Scouts from the nonprofit berthing program was Boy Scouts' leadership policies. (App. A-25; *see* App. A-6-A-8.) By allowing the City to condition access to a government program on the relinquishing of constitutional rights of speech and association, the California court significantly departed from this Court's First Amendment precedents and created a conflict with other circuits. The guidance of this Court is necessary to ensure that the government is not allowed to so easily circumvent the protections provided by the First Amendment.

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9. *See also Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978). Indeed, the Fifth and Eighth Circuits have granted the Ku Klux Klan greater First Amendment protection than the California Supreme Court has permitted Boy Scouts.

III.
THE CALIFORNIA SUPREME COURT'S DECISION IS INCONSISTENT WITH THIS COURT'S DECISIONS REJECTING UNCONSTITUTIONAL CONDITIONS

It is undisputed that the City of Berkeley has conditioned the participation of the Berkeley Sea Scouts in the berthing program on their agreement to refrain from exercising constitutionally-protected rights. By sanctioning a scheme under which the City did not directly compel a private organization to relinquish its constitutional rights but rather penalized the group for exercising these rights, the California court allowed the City to impose an unconstitutional condition on the Berkeley Sea Scouts' participation in the marina program.

This Court has left no doubt "that constitutional violations may arise from the deterrent, or chilling, effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights." *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 674 (1996) (internal citation omitted). Put another way, this Court has held that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990).

The unconstitutional conditions doctrine has been consistently applied in the decisions of this Court stretching back five decades to *Speiser v. Randall*, 357 U.S. 513 (1958), where, in invalidating California's attempt to condition receipt of a tax exemption on the taking a loyalty oath, the Court held that to

> deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

Id. at 518.

Since that time, this Court has repeatedly held that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Board*, 450 U.S. 707, 716 (1981); *see Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542, 548 (2001) (conditioning grants to lawyers for indigent persons on their refusal to challenge validity of welfare laws was unconstitutional); *Umbehr*, 518 U.S. at 674 (county board's decision not to renew trash hauling contract because of hauler's criticism of board was unconstitutional); *Rutan*, 497 U.S. at 77-78 (basing personnel decisions on party affiliation was unconstitutional); *FCC v. League of Women Voters of California*, 468 U.S. 364, 402 (1984) (conditioning grants to public broadcasters on their agreement to refrain from editorializing was impermissible); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

In the face of these precedents, the California court misapplied *Rust v. Sullivan*, 500 U.S. 173 (1991), to conclude that the conditioning of participation on the relinquishment of First Amendment rights was permissible because the City's berthing program is, in practical effect, a subsidy. This Court has not hesitated to strike down

conditions, even conditions on the receipt of monetary aid, that were unrelated to the central purpose of the government program and "programmatic message." *Legal Services Corp.*, 531 U.S. at 542, 548 (government could not condition grants to lawyers serving indigent clients on their agreement to refrain from challenging the constitutionality of welfare laws since the grant program was not designed "to promote a government message"); *see Rosenberger*, 515 U.S. at 831-32 (refusal to fund student publication with religious viewpoint was unconstitutional where purpose of funding was not to promote a government message but rather to encourage a variety of viewpoints); *League of Women Voters*, 468 U.S. at 402 (ban on editorializing by public radio networks was unconstitutional since it was unnecessary in light of purposes of government funding program). If the government were permitted to recast a condition on funding as a mere definition of its program, "the First Amendment [would] be reduced to a simple semantic exercise." *Legal Services Corp.*, 531 U.S. at 547.

The City of Berkeley has imposed a condition intended to "press" the Berkeley Sea Scouts "to conform their beliefs and associations to some state-selected orthodoxy." *Rutan*, 497 U.S. at 75. By sanctioning the City's conduct, the decision below runs afoul of this Court's decisions prohibiting the government from attempting to indirectly coerce private organizations into relinquishing their constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 11, 2006

SEP 8 - 2006

No. 06-40

IN THE

Supreme Court of the United States

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* UNITED STATES JUSTICE FOUNDATION, CALIFORNIA STATE ASSEMEMBLYMAN RAYMOND HAYNES, CALIFORNIA STATE ASSEMBLYMAN CHUCK DEVORE, EAGLE FORUM OF CALIFORNIA, OPERATION RESCUE, FORMER MAYOR OF THE CITY OF SAN DIEGO ROGER HEDGCOCK, VICE MAYOR FOR THE CITY COUNCIL OF LA MESA BARRY JANTZ, THE CITIZENS UNITED FOUNDATION, AND THE HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF PETITIONER

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Amici move pursuant to 37 of the Rules of this Court for leave to file the accompanying brief as *amici curiae* in support of Petitioner. This brief is submitted with the consent of the Petitioner, whose consent letter has been lodged with the Clerk of the Court. The Respondent, through its counsel, refused to grant permission for the filing of this brief.

Attorney of Record, Gary G. Kreep, of the United States Justice Foundation (hereinafter, "USJF"), has reviewed the pleadings in this action and is familiar with the issues involved and the scope of their presentation.

USJF is a nonprofit corporation organized under the laws of the state of California and dedicated to the preservation of constitutional rights. Since its inception in 1979, USJF has regularly assisted individuals and classes, not only to redress individual acts of injustice, but also to promote important public policy. USJF has represented numerous parties in cases involving constitutional concerns arising from the enactment of various state and municipal laws.

In 1995 USJF supported the Boy Scouts with an *amicus curiae* brief (written by then-USJF board member James V. Lacey) to the California Supreme Court in *Randall v. Boy Scouts of America, Orange County Council, Inc.*, 17 Cal 4th 736 (1998), a case challenging the Scouts' right to exclude atheist members. The California Supreme Court overturned two lower court decisions in determining that the Unruh Civil Rights Act, a public accommodations law, did not apply to the Boy Scouts. Many of the facts and issues of this case parallel those in the *Randall* case.

Amici believe that the outcome of the case at bar will have far-reaching results in California, as legislation is being enacted during every legislative session calling into question the rights of faith-based organizations to uphold their own ideological requirements without foregoing public benefits.

Respectfully submitted,

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September 8, 2006

QUESTIONS PRESENTED

The City of Berkeley has disqualified the Berkeley Sea Scouts from the City's program allowing free berthing at the Berkeley Marina for community-oriented nonprofit organizations, necessitating that Petitioner Evans personally pay the berth fees. The Sea Scouts have been excluded because of their affiliation with the Boy Scouts of America, and because the City contends that the Boy Scouts' belief-based membership policies conflict with City anti-discrimination rules.

1. Does refusing access to a generally available government program, facility, or benefit, on the basis of an applicant's philosophically based viewpoints or associations (and actual adherence to those viewpoints and associations), violate the First Amendment freedom of belief and association?

2. Does refusing access to a generally available government program, facility, or benefit, on the basis of an applicant's philosophically based viewpoint or associations (and actual adherence to those viewpoints and associations), violate equal protection of the laws under the Fourteenth Amendment and the principle that government must be viewpoint neutral in allocating benefits and making public facilities available?

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STATEMENT OF INTEREST OF *AMICI*[1]

Amici seek to insure that state and local, activist, law-makers—in their zealous attempts to "protect" a vocal minor-

[1] Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici curiae*, has made a monetary contribution to the preparation or submission of this brief.

ity—do not enact legislation designed to compel acceptance of the homosexual lifestyle through financial chastisement of groups who disagree with Berkeley's requirements, based on ideological grounds. These state and local government agencies have erroneously equated this lifestyle choice to a special, protected, status, unmatched by any other protected class under any American law. Municipalities such as Berkeley have thus wielded their power as lawmakers to force private groups to endorse and condone *beliefs and behavior* in the name of advancing "civil rights."

The United States Justice Foundation (hereinafter, USJF) is a nonprofit corporation organized under the laws of the State of California and dedicated to the preservation of civil and human rights. Since its inception in 1979, USJF has regularly assisted individuals and classes, not only to seek redress for significant acts of injustice, but also to promote valuable public policy matters.

California State Assemblyman Raymond S. Haynes has represented 800,000 Californians in the California Legislature and was first elected in 1994. In 1996, former Senator Haynes was elected by the Senate Republican Caucus to serve as Republican Whip. In that position, he was responsible for generating Republican analyses for the thousands of bills that reached the California State Senate Floor.

California State Assemblyman Chuck DeVore represents over 450,000 constituents in California from Orange County. Prior to his election to the Assembly in 2004, he worked in the private sector. From 1991 to 1996, Assemblyman DeVore served as a City Commissioner for the City of Irvine, California. He was Chairman of the Irvine Community Services Commission from 1994 to 1995 and Vice Chairman the year before. He has seen the effects of local legislation on businesses and represents Californians who believe in maintaining the freedoms originally intended by the Founding Fathers.

Eagle Forum of California is a division of its parent organization, Eagle Forum, a long-standing, nonpartisan, nonsectarian organization of men and women who believe in God, family, and country. Their mission is dedicated to preserving the political, economic, moral, and social principles upon which our nation was founded.

Operation Rescue, a national organization dedicated to restoring legal personhood status to the unborn, understands the impact of the law on deeply held religious beliefs. Operation Rescue has been involved in legal controversies related to expression of personal convictions and viewpoints.

Vice Mayor of the La Mesa, California, City Council Barry Jantz is actively involved with review of local legislation in his city and is Chief of Staff to Assemblyman Jay LaSuer, who represents the 77th Assembly District.

Roger Hedgecock, a California attorney and former Mayor of the City of San Diego, has received an award for Outstanding Service from the Boy Scouts. His radio show has hosted several forums for discussion on the local lawsuit involving the Boy Scouts and their lease with the City of San Diego. He has a personal interest in the preservation of the Boy Scouts' discretion in establishment of their private policies.

Citizens United Foundation is a nonprofit, nonpartisan, educational organization established to conduct research and to inform the public on a variety of issues of national importance, including issues related to belief in God, the role of traditional families and religious traditions in American society, the original intent of the Framers, and the correct interpretation of the United States Constitution.

Howard Jarvis Taxpayers Association is a tax-exempt organization, like the Sea Scouts. They are a California-based, legislative-watch organization, constantly monitoring

state legislative action for violations of constitutional protections and communicating this information to their membership statewide.

All *amici* have concerns that the holding of the California Supreme Court in this case, if left unchecked, will set a precedent for other government entities to enact similar laws designed to pressure faith-based charities to disregard their sincerely held religious beliefs or else forego receiving any sort of governmental financial benefit.

The misapplication of similar state and local laws to faith-based institutions will have a crippling effect on many worthwhile organizations and will harm local communities and society as a whole. *Amici* urge the Court to grant the petition.

SUMMARY OF THE ARGUMENT

This case presents the questions of whether the City of Berkeley has violated the First Amendment's guarantee of freedom of belief and association and the Fourteenth Amendment's guarantee of equal protection under the law, by denying access to an otherwise obtainable government benefit on the basis of holding a particular, "undesirable" viewpoint and right of association that Berkeley has decided should be eradicated.

Berkeley's ordinance improperly usurps to local government Congress's role of defining which organizations enjoy charitable status for the purpose of receiving a public benefit.

In this brief, *amici* focus on the following: (1) Local governmental entities cannot mandate "doctrines" to be accepted by charitable and religious organizations. By withholding a financial benefit from otherwise qualifying charities that refuse to compromise their ideologically based practices, the City of Berkeley has, in essence, nullified an entity classification that has been designated by Congress. (2) Unlike

typical public-accommodations regulations, which are not applicable to noncommercial charities, Berkeley's ordinance effectively targets noncommercial charities opposed to homosexuality on ideological grounds. The law in question is part of a growing trend to use such measures, purportedly to eliminate "discrimination" against homosexuality, to essentially discriminate against faith-based organizations.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE CITY OF BERKELEY HAS USURPED TO ITSELF THE RIGHT TO DETERMINE WHICH INSTITUTIONS ARE CHARITABLE FOR THE PURPOSE OF RECEIVING A PUBLIC BENEFIT

Congress has defined a charity in order to promote the benefits that charities contribute to society. The *Internal Revenue Code* has provided tax-exempt status for:

> "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 26 U.S.C. § 501 (c) (3).

Congress has so defined and promoted charities because, as this Court said in *Bob Jones University v. U.S.*, 461 U.S., 574, 591-592, 103 S.Ct. 2017, 2028 (1983):

> "Charitable tax exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues."

To be entitled to tax-exempt status under § 501(c)(3), an organization must first fall within one of the categories specified by Congress, and, in addition, must serve a valid charitable purpose. *Id. at* 592, 103 S.Ct. at 2028-29. The Sea Scouts meet the requirements explicitly defined by Congress. Moreover, their parent organization, the Boy Scouts, is federally chartered under 36 U.S.C. §§ 30901-30908, Title 36 being the code section dedicated to "Patriotic Societies and Observances." The charitable status conferred on the Scouts—one that has been defined by Congress—is now being thwarted by the higher threshold required by the City of Berkeley.

Although, on its face, the local ordinance does not violate federal law, it is unconstitutional as applied to the Scouts herein. Berkeley alleges that the other groups using the marina, the Berkeley Yacht Club, the Cal Sailing Club and the Nautilus Institute, have all have agreed not to discriminate on the basis of sexual orientation and, therefore, are entitled to the free berth space.[2] What Berkeley and the lower courts

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[2] Although there are six prohibited bases for discrimination under Berkeley *Municipal Code* Chapter 13.28.010—race, color, religion, sex, national origin, and sexual orientation—in deciding which organizations are barred from receiving free berth space, Berkeley is apparently more adamant about protecting atheists and homosexuals than other protected classes. The Cal Sailing Club has sponsored a women-only sailing clinic. (Described at http://cal-sailing.org/ bottle/2002/aug.html.)

have not considered, however, is that these other groups do not hold an organizational position on one's duty to God and sexual morality as part of their foundational beliefs as the Scouts do. The Scouts' policies regarding atheists and homosexuals in membership and leadership go to the core of their philosophy.

The effect of conditioning receipt of a benefit on adherence to the ordinance in question is to promote some organizations while stifling others. The City justifies itself by essentially deciding that an organization is *per se* not a charity unless it is: (a) indifferent to whether its participants profess a belief in God or not and is (b) morally unopposed to homosexuality. Here, Berkeley is *redefining* the federal government's classification of a charity.

If Berkeley is permitted to continue using its local ordinance to deny public benefits, such as the free berth space, to 501(c)(3) organizations that would otherwise qualify to receive them, then any state or local government can promote favored organizations and stifle disfavored organizations by simply "redefining" who is entitled to charitable status—and who is not—through its own, mandatory standards. This will result in a patchwork of unequal, politically discriminatory standards as to what constitutes a charity, instead of the politically neutral, universal standard now set by Congress.

The contention that Berkeley makes, that the racial discrimination found in *Bob Jones, supra,* is analogous to the anti-atheist and anti-homosexual discrimination alleged in this case, is faulty and distinguishable. In *Bob Jones*, this Court held that in the event drastic measures are taken to revoke the tax-exempt status of an organization, thereby financially disciplining that organization, the highest level of public policy must have been offended. As this Court declared:

> "We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters, with serious im-

> plications for the institutions affected; a declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates *deeply* and *widely accepted* views of elementary justice." *Id.* at 592, 103 S. Ct. at 2029 (emphasis added).

The ongoing struggle to end racial discrimination in this country, in the aftermath of ending slavery, has been a key element of our shared history since 1865, upon the ratification of the 13th Amendment. Section 1 of that amendment provides that, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction" and, in Section 2, that, "Congress shall have power to enforce this article by appropriate legislation." *U.S.C.A. Const. Amend. XIII.*

The will of the majority, through Congress, to rectify the badges and incidents of slavery has been acknowledged nationally, thus launching the passage of the Civil Rights Act of 1964 and the establishment of a number of foundations and organizations to make progress in the advancement of racial desegregation and the elimination of racial prejudice. In *Bob Jones*, the school's policy prohibiting interracial dating, although founded on a sincerely held religious belief, which is normally afforded the highest level of constitutional protection, violated the longstanding, profound, and widespread public commitment to the eradication of the badges and incidents of slavery. For these reasons, based on a very narrow and different set of circumstance than those presented here, this Court permitted the revocation of Bob Jones University's tax-exempt status. *Bob Jones, supra*, 461 U.S. at 592, 103 S. Ct. at 2029.

In contrast to the view at issue in *Bob Jones*, that racial bigotry is socially harmful and morally reprehensible, the position advanced by Berkeley's ordinance—that homosexual conduct is socially beneficial and morally acceptable—is a deeply controversial and widely rejected view, particularly among faith-based organizations.

To equate moral reservations against homosexuality with racial bigotry is a leap of monumental proportions. Should the argument that the two are similar for constitutional scrutiny hold, all faith-based organizations that subscribe to a contrary position will be deemed to violate a fundamental right. Thus, an organization's perceived "negativity" towards homosexuality should not be dismissed as so much bigotry in analyzing whether an organization is "charitable" or not, but consideration must be given to the group's foundational ideology and purpose.

The Boy Scouts and Sea Scouts both embrace, as part of their basic ideology and philosophy, a belief in God and an oath to uphold particular moral standards. These foundational beliefs distinguish the facts here from those in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S.Ct. 3244 (1984). In *Roberts,* a Minnesota anti-discrimination act prohibited denial of access to organizations based on gender, among other criteria. The Jaycees had a policy that prohibited women in their general membership, which was challenged as a violation of the anti-discrimination act. Importantly, in upholding the act in question, this Court noted that there was no basis for concluding that admitting women as full voting members would impede the Jaycee's ability to engage in its protected activities or to disseminate its preferred views. Furthermore this Court observed:

> "The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from

> those of its existing members. *Cf. Democratic Party of United States v. Wisconsin*, 450 U.S., at 122, 101 S.Ct., at 1019 (recognizing the right of political parties to 'protect themselves from intrusion by those with adverse political principles.'" *Id.* at 627, 104 S.Ct. at 3254-3255.

Being compelled to allow women did not compromise the foundational beliefs of the Jaycees organization, unlike the case here, where compliance requires the Sea Scouts and their parent organization, the Boy Scouts, to imperil core philosophies of allegiance to God and repudiation of moral impurity, including homosexual conduct. Unlike the Jaycees' policies regarding women members, these positions are foundational to the very purpose of the Sea Scout and Boy Scout organizations. *Accord, Boy Scouts of America v. Dale*, 530 U.S. 640, 644, 120 S. Ct. 2446, 2454 ("Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members;").

The City's ordinance thus demands conformity to a highly controversial and widely rejected moral view—at odds with the foundational beliefs of the Sea Scouts and Boy Scouts—on pain of losing one's status as a "charity." While the loss of this status may appear narrow in scope (since it only applies within the City of Berkeley), as other government entities adopt similar measures, disfavored charities lose eligibility for public benefits in ever-widening venues. Thus, the power to promote or penalize favored or disfavored charities is now being wielded at every level of government—to the detriment of society as a whole—as disfavored charities are forced to either compromise their core values or cut back their programs and services.

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE BERKELEY ORDINANCE IS AN IMPROPER USE OF A PUBLIC-ACCOMODATIONS REGULATION.

The Boy Scouts' policy towards atheists was previously challenged in California as a violation of the Unruh Civil Rights Act (California *Civil Code* Section 51) in a case in which two brothers were prohibited from continuing their membership for failing to participate in the religion-related portion of the scouting program. *Randall v. Boy Scouts of America, Orange County Council, Inc.*, 17 Cal. 4th 736 (1998). The trial court enjoined the Boy Scouts from barring the two atheist Cub Scouts from advancing in the organization based on the Unruh Act's prohibition against religious discrimination by business entities. On appeal from the California Appellate Court, which had affirmed the order granting the injunction, the California Supreme Court reversed and held:

> "[D]efendant's attributes and activities render the Unruh Civil Rights Act inapplicable to its membership decisions. Defendant not only is a charitable organization with a predominantly expressive social purpose unrelated to the promotion of the economic interests of its members, but offers to its members a program that is not the equivalent of a traditional place of public accommodation or amusement. Despite the organization's limited business transactions with the public, defendant does not sell the right to participate in the activities it offers to its members. For these reasons, with regard to its membership decisions, defendant is not operating as a business establishment within the purview of California's public accommodation statute." *Id.* at 744.

California *Civil Code* Section 51, the Unruh Act, by its terms applies only to business establishments. Section 51 (b) provides:

> "(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or *sexual orientation* are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all *business establishments* of every kind whatsoever." (emphasis added).

Dissatisfied with this limitation on the reach of California's public accommodation law, covering only arbitrary discrimination by business establishments, the City of Berkeley enacted its own law prohibiting *any* discrimination—whether arbitrary or ideologically motivated—based on sexual orientation. Furthermore, Berkeley's law is clearly designed to bring *nonprofit* organizations within its sweep by its application to anyone receiving a public benefit from the city. Berkeley *Municipal Code* Chapter 13.28.060(A)(3) states:

> "It shall be an unlawful service practice for any person to deny any individual the full and equal enjoyment of, or to impose different terms and conditions upon the availability of, any service, program or facility *wholly or partially funded or otherwise supported by the City* on the basis of such individual's sexual orientation." (emphasis added).

While not all non-profit organizations are exempt from compliance with the Unruh Act, those deemed to be primarily noncommercial in purpose, such as the Boy Scouts, are not subject to the Unruh Act. In contrast, by its application to *all* entities receiving whole or partial funding from the City, the Berkeley ordinance seeks to control what the Unruh Act does not—the services, programs, and facilities of noncommercial, *charitable* organizations. This is a blatant attempt to control charitable organizations that oppose homo-

sexuality on ideological grounds—at least to the extent that such organizations might otherwise have received financial support from the City of Berkeley. In other words, the City of Berkeley is not just trying to eliminate arbitrary, economically based discrimination—as with the Unruh Act—but conscience-driven, ideologically based "discrimination" by faith-based charities. The Berkeley ordinance is thus *itself* discriminatory against the ideologies and religions of faith-based charities that oppose homosexuality as part of their core beliefs and purpose.

Even worse, this type of measure is not limited to the City of Berkeley. Legislation recently enacted by the California state legislature similarly tries to circumvent the "limitations" of the Unruh Act by also reaching beyond control of commercial entities so as to similarly regulate non-commercial, charitable organizations. Like the Berkeley ordinance, this new legislation seeks to control the policies of faith-based entities established for religious or charitable purposes. California Law SB 1441, authored by homosexual activist State Senator Sheila Kuehl, was recently ratified by the State of California. This bill is an amendment to Section 11135 of the California *Government Code*, which deals with discrimination. The language reads in pertinent part:

> SECTION 1. Section 11135 of the Government Code is amended to read: 11135. (a) No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.

> Notwithstanding Section 11000, this section applies to the California State University[3].

The above language reiterates that there shall be no "unlawful" discrimination, yet the language of the bill does not specify whether religiously motivated "discrimination" is lawful or unlawful, nor does it provide for any exceptions for religious organizations. The burden of proving the inapplicability of the statute—which will have to be litigated—is on those faith-based entities that deem themselves to be exempt from this regulation based on First and Fourteenth Amendment protections.

Other cities and states, nationwide, are similarly passing laws seeking to control—not just commercial entities—but *noncommercial, charitable* entities in their policies and practices concerning homosexuality. Again, as with Berkeley's ordinance, these laws do not just target arbitrary, economically based discrimination, but conscience-driven, ideologically based "discrimination."

The Court is urged to grant the petition because this growing trend places in jeopardy the very existence of faith-based charities that have policies and practices concerning homosexuality based on sincerely held religious convictions, and such legislation has the effect of punishing such organizations based on their beliefs. The Berkeley ordinance at issue here is clearly just the tip of the iceberg.

CONCLUSION

There is a growing threat to the very existence of faith-based charities, all in the name of eliminating unlawful "discrimination." Lawmakers at the state and local level, like the City of Berkeley in the case at hand, are wrongly usurping to themselves the role of defining which entities qualify as

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[3] Full text available at *www.leginfo.ca.gov.*

"charities" for the purpose of receiving public benefits—defining as "noncharities" any organization ideologically opposed to homosexuality. Reaching far beyond the traditional "public accommodations" laws that target discrimination by commercial business entities, laws such as the Berkeley ordinance at issue here actually discriminate against particular ideologies in withholding public benefits from disfavored charities.

Based on all of the foregoing, the Court is urged to grant the petition for a writ of certiorari to address and resolve these issues.

Respectfully submitted,

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No. 06-40

In the Supreme Court of the United States

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY, CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE *AMICUS BRIEF* And BRIEF OF THE THOMAS MORE LAW CENTER, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, *Amicus Curiae* Thomas More Law Center states that it is a not-for-profit corporation, does not have any parent corporation, and no public corporation owns ten percent or more of its stock.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Thomas More Law Center respectfully requests that this Court grant it leave to file the attached brief in support of the petitioner in the above-captioned case. Pursuant to Rule 37(2)(b), counsel understands that the petitioner has given its consent to the filing of briefs by *amicus* and has a filed a letter with the court attesting to that consent. Counsel for the respondent declined to give an unqualified consent to the filing of this *amicus* brief.

The Thomas More Law Center ("TMLC") is a national, public interest law firm dedicated to defending and promoting the sanctity of human life, religious liberty, and time-honored family values, as seen in light of the Roman Catholic tradition. It engages in public interest litigation, public education, and related activities pursuant to those goals.

The TMLC has an interest in this case because a governmental body has used the force of law to stifle a fundamental right guaranteed by the First Amendment. In this regard, the TMLC notes that this case illustrates increasingly common efforts to compel compliance with the prevailing orthodoxy of political correctness by force of law that threaten to eviscerate the fundamental rights to free speech and expressive association as well as the free exercise of religion. The TMLC has counseled Catholic Charities of Maine ("CCM") and has dealt first-hand with a reprehensible effort by the City of Portland, Maine, to require CCM to recognize same-sex "domestic partnerships" as a condition of eligibility for government grants. The TMLC notes that the City of Portland imposed that condition with reckless disregard for CCM's sincerely held religious conviction that material cooperation with such conduct is directly contrary to

the teaching of the Roman Catholic Church concerning the natural family and its essential role in promoting the welfare of spouses, children, and the common good. *See Catholic Charities of Maine, Inc. v. City of Portland*, 304 F.Supp.2d 77 (D. Me. 2004).

The TMLC has also observed with concern the use of civil law to compel organizations with a Christian inspiration, affiliation, and mission, to engage in conduct directly contrary to faith and morals as seen in light of the Roman Catholic faith. The TMLC has watched in dismay as the Supreme Court of the State of California has approved the use of civil law to require institutions affiliated with the Roman Catholic Church to provide contraceptives although the Roman Catholic Church teaches that the use of artificial means to thwart the procreative power given to man by God is gravely wrong. *See Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento*, 32 Cal.4th 527 (2004), *cert. denied*, 543 U.S. 816 (2004).

The TMLC sees in this case another odious use of civil law to compel an organization which engages in expressive association to oppose the homosexual lifestyle and atheism to include individuals who espouse contrary views as a condition of eligibility for a government benefit. The TMLC believes this indirect effort to force the Sea Scouts to admit individuals whose views on atheism or the homosexual lifestyle are directly contrary to those which the Sea Scouts advance by means of expressive association is the epitome of an unconstitutional condition. The TMLC further believes that such a policy, if countenanced by this Supreme Court, will establish a dangerous precedent that will be used to further undermine the fundamental rights of free speech, expressive association, and the free exercise of religion. For this reason the TMLC respectfully requests leave of this honorable Court

to file the attached brief in order to assist this Court in a proper resolution of this case.

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INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus* is fully stated in its motion for leave to file a brief *amicus curiae*.

STATEMENT OF THE CASE

This *amicus* adopts the Statement of the Case as presented by Petitioner.

ISSUE PRESENTED FOR REVIEW

I. Given that the City of Berkeley cannot apply its nondiscrimination ordinance directly to the Sea Scouts in order to force the Sea Scouts to include individuals who support the homosexual lifestyle or atheism in light of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), can Berkeley enforce that ordinance indirectly by making forced inclusion a condition of eligibility for a government benefit?

SUMMARY OF THE ARGUMENT

As this Supreme Court has long held, "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990). "[T]his principle, known as the unconstitutional conditions doctrine," *see Rumsfeld v. Forum*

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

For Academic & Institutional Rights, Inc., __ U.S. __, 126 S.Ct. 1297, 1307 (2006), has a simple yet compelling rationale: "[i]f the government could deny benefits to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would be in effect penalized and inhibited.... Such interference with constitutional rights is impermissible." *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 717 (1996). Indeed, if government could condition eligibility for benefits upon the forfeiture of constitutional rights, then the very governmental powers granted by the people, and for the people, could be used to make the people subservient to government.

The Sea Scouts' petition arises from just such an abuse of government power by the City of Berkeley. As the California Supreme Court acknowledged, Berkeley deprived the Sea Scouts of free berths made available to nonprofits "due to [BAS's] discriminatory policies against gays and atheists." *Evans v. City of Berkeley*, 38 Cal. 4th 1, 9 (2006). In essence, Berkeley, which cannot apply its nondiscrimination ordinance against the Sea Scouts directly because of this Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), applied that nondiscrimination ordinance indirectly–by making compliance with the ordinance a condition for a government benefit–the free access to marina berths given to nonprofit organizations. In doing so, Berkeley violated the principle that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan*, 497 U.S. at 77-78.

The court below approved the unconstitutional condition Berkeley placed upon access to public facilities based on facile characterization and a superficial view of this Supreme Court's controlling precedent. Labeling equal access to

public facilities for the purpose of private expressive activity a "subsidy," the court below concluded that Berkeley could condition this benefit on the very kind of forced inclusion that would vitiate the Sea Scouts' expressive association. Labeling the application of the nondiscrimination ordinance "content-neutral," the court below eschewed any meaningful scrutiny of Berkeley's effort to make the Sea Scouts accept members whose views directly contradict those to which the Sea Scouts are committed.

This Supreme Court's controlling precedent make both of these mischaracterizations-and the decision which they undergird-wholly insupportable. This Court has never regarded equal access to public facilities for the purpose of private expressive activity as a "subsidy." Quite the contrary, it has repeatedly recognized that equal access is more realistically characterized as a government benefit that cannot be denied based on activity protected by the First Amendment. *See, e.g., Healy v. James*, 408 U.S. 169 (1972). Likewise, this Court has never condoned violations of the right to expressive association merely because the violation results from the application of laws that do not target viewpoint on their face. If that were the case, then *Dale*, would have been decided differently-but it was not. From this it follows that unconstitutional conditions cannot be excused on the ground that Berkeley's nondiscrimination ordinance is content-neutral on its face.

More fundamentally, this Court's decision in *Dale* wholly undermines the pretense, endorsed by the court below, that Berkeley's policy is viewpoint neutral. Quite the contrary, *Dale* recognizes that the forced inclusion of members whose views contradict views a group seeks to advance through expressive association is tantamount to forcing a group to advance views it does not accept. The necessary corollary

required by this Court's unconstitutional conditions doctrine is that denying government benefits based on a group's refusal to admit individuals whose views contradict those which the groups seeks to advance through expressive association is tantamount to viewpoint discrimination.

The Thomas More Law Center respectfully requests that this Court grant the Sea Scouts' petition for a *writ of certiorari* and strike down the unconstitutional condition Berkeley has placed on the Sea Scouts' eligibility for the benefit that Berkeley extends to nonprofit organizations. This Court's decision in *Dale*, prevents Berkeley from using its nondiscrimination ordinance to make the Sea Scouts admit members whose views contradict the values to which the Sea Scouts are committed. This Court should take this opportunity to make plain the logical corrollary required by this Court's unconstitutional conditions doctrine: just as Berkeley cannot directly force the Sea Scouts to include individuals whose views contradict the Sea Scouts' opposition to the homosexual lifestyle and atheism, Berkeley cannot do so indirectly by requiring the Sea Scouts to associate with individuals who espouse those views as a condition of eligibility for a government benefit because "[s]uch interference with constitutional rights is impermissible." *O'Hare Truck Service*, 518 U.S. at 717.

ARGUMENT

The question presented by this case is simply stated: Given that Berkeley cannot apply its nondiscrimination ordinance directly to the Sea Scouts in order to force the Sea Scouts to include individuals who support the homosexual lifestyle or atheism in light of *Dale*, *supra*, can Berkeley enforce that ordinance indirectly by making forced inclusion a condition of eligibility for a government benefit? The

Thomas More Law Center respectfully submits that the answer to that question is quite clearly: No. A long line of this Supreme Court's precedents hold that government cannot condition eligibility for benefits on forfeiture of fundamental rights. Notwithstanding this doctrine, Berkeley seeks to secure just such a forfeiture by forcing the Sea Scouts to admit members whose views contradict their opposition to the homosexual lifestyle and atheism in order to qualify for free access to marina berths. Given the uncontrovertible fact that the Sea Scouts are committed to expressive association with the Boy Scouts of America, and the opposition to the homosexual lifestyle and atheism which this Court acknowledged in *Dale*, there is no doubt that Berkeley's decision to deprive the Sea Scouts of free berths made available to nonprofits "due to [BSA's] discriminatory policies against gays and atheists," *see Evans*, 38 Cal. 4th at 9, violates this Court's unconstitutional conditions doctrine.

The court below approved a result directly at odds with this Court's unconstitutional conditions doctrine because it elevated form above substance. The court below focused on form, not substance, despite this Court's recognition that it is "not free to disregard practical realities" when addressing restrictions placed on fundamental rights because those rights "are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference. *Healy*, 408 U.S. at 183. For this reason, this Court has consistently avoided "[d]etermining constitutional claims on the basis of...formal distinctions, which can be manipulated largely at the will of the government agencies concerned...." *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 679-80 (1996)(holding that eligibility for government contracts cannot be conditioned on political fealty and citing cases for the proposition that the law must focus on substance not form).

The opinion below must be reversed precisely because it fails to realistically characterize the practical realities of this dispute and rests upon a misapplication of this Court's controlling precedent. For one thing, the court below characterized access to public facilities for the purpose of private expressive activity as a "subsidy." But it is unrealistic–and inconsistent with this Supreme Court's decisions–to characterize access to public facilities for the purpose of private expressive activity as a "subsidy." This Court has always characterized access to public facilities for the purpose of private expressive activity realistically as a government benefit. From this it follows that Berkeley's policy is an effort to condition eligibility for a government benefit on the very sort of forced inclusion that violates the Sea Scouts' right to expressive association–not a "subsidy" in any meaningful sense.

The court below also held that Berkeley's effort to condition eligibility for a government benefit did not violate the First Amendment because the condition was imposed by means of a law that did not target expressive activity on its face. But it is wholly mistaken to suppose that restrictions on expressive association are insulated from the requirements of the First Amendment merely because the restrictions are imposed by means of a law which, on its face, regulates conduct not expression. If that were the case, then *Dale*, would have been decided differently. From this it follows that Berkeley's unconstitutional condition cannot be excused on the grounds that its policy turns on conduct not speech.

In a related error the court below held that Berkeley's effort to require the Sea Scouts to include those whose views disagree with the views to which the Sea Scouts are committed did not constitute viewpoint discrimination because the condition was imposed by means of a law that did not

target expressive activity on its face. But it is wholly untenable to assert that conditioning eligibility for a government benefit on the forced inclusion of members whose views contradict those the Sea Scouts seek to advance through expressive association does not violate the Sea Scouts' right to expressive association. Again, if this were the law, then *Dale*, *supra*, would have been decided differently–but it was not. From this it follows that Berkeley's policy, which denies a benefit to the Sea Scouts because they will not agree to include individuals who hold views contradicting those of the Sea Scouts must be seen for what it is: viewpoint discrimination in the allocation of government benefits.

In sum, the decision below must be reversed because it is plainly wrong to hold that Berkeley, which cannot enforce its nondiscrimination ordinance against the Sea Scouts directly, can enforce that ordinance indirectly by making compliance with that ordinance a condition of eligibility for a government benefit. As demonstrated below, Berkeley cannot condition eligibility for free berths on the forced inclusion of those whose views contradict the views that the Sea Scouts advance through expressive association because it has not shown the compelling interest required to override First Amendment rights. As a result, the condition that Berkeley has placed upon the benefit is an unconstitutional condition. Therefore, Berkeley's policy must be struck down.

I. Equal Access to Public Facilities Is A Benefit Not A Subsidy.

The opinion below rests upon this premise: "under the decisions of the United States Supreme Court, that Berkeley's nondiscrimination requirement applied only to programs assisted by a city subsidy, in the form of free berths at the marina, is virtually dispositive." *Evans*, 38 Cal. 4th at 11.

The court below viewed its characterization of free access to a marina berth as a "subsidy" to be "virtually dispositive" because this led it to ignore the principle "that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons....[i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interest in freedom of speech." *Rutan*, 497 U.S. at 72. Attention to this first question reveals one error underlying the decision below and goes a long way toward explaining how the court below managed to approve the very result forbidden by this Court's unconstitutional conditions precedent.

It is true that characterization of free access to the marina as a "subsidy" is "virtually dispositive," *Evans*, 38 Cal. 4th at 11, but the disposition required by that (mis)characterization is reversal. For although the court below viewed access to public facilities as a "subsidy," this Court has always viewed access to public facilities for the purpose of private expressive activity as a government benefit. For example, in *Healy*, *supra*, this Court observed that "the primary impediment to free association flowing from nonrecognition...[was] the denial of use of campus facilities for meetings and other appropriate purposes," *Healy*, 408 U.S. at 181, and it has also recognized that *Healy*, stands for the proposition that it is unconstitutional to "impose penalties or withhold benefits based on membership in a disfavored group," *FAIR*, 126 S.Ct. at 1312 (underline added). Similarly, in *National Endowment For The Arts v. Finley*, 524 U.S. 569 (1998), this Court noted the distinction between decisions to grant funds for art projects and "the subsidy at issue in *Rosenberger*," as well as "decisions on allocating public benefits such as access to a school auditorium or a municipal theater." *Id.* at 586 (*citing Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), *Lamb's Chapel v. Center Moriches*

Union Free School Dist., 508 U.S. 384 (1993), *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1993)(underline added). Likewise, in *Board of County Commissioners, Wabaunsee County, Ka. v. Umbehr*, 518 U.S. 668 (1996), after noting that "government may not deny a benefit to a person on a basis that infringes his constitutionally protected...freedom of speech," *id.* at 675, this Court listed its cases dealing with "users of public facilities and recipients of small government subsidies...." *Id.* at 680 (*citing Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), *Healy v. James*, 408 U.S. 169 (1972)(access to campus facilities for student meetings and activities); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984)(government subsidy for private speech).

The point here is that this Court has understood its decisions dealing with access to public facilities to concern eligibility for a public benefit (not a subsidy) and it has consistently distinguished this benefit from subsidies. This Court does not treat equal access to public facilities as a subsidy because it is not realistic to do so. Granting similarly situated citizens equal access to public facilities for the purpose of private expressive activity is a benefit; it is not a "subsidy" in any meaningful sense–any more than equal access to public parks or public roads is a subsidy.

The characterization of access to public facilities as a "subsidy" adopted by the court below rings hollow for another reason: the facts belie it. Berkeley does not provide a subsidy to nonprofit organizations when it waives the fee for access to marina berths. The real issue here is whether Berkeley can force the Sea Scouts to pay private (not public) funds for access to public facilities–and why some citizens are forced to pay while others are not. In a very real sense,

Berkeley has decided to make the Sea Scouts pay for their decision to exercise their right to expressive association.

For this simple reason, the reliance that the court below placed on cases providing for actual (not fictional) funding or subsidies is wholly misplaced. *See Evans*, 38 Cal. 4th at 11-15. Each of those cases can be fairly characterized as involving a subsidy because they involved a payment of public funds or a tax exemption. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991)(federal funds for counseling that delivers government message to patients); *United States v. American Library Assn, Inc.*, 539 U.S. 194 (2003)(federal funds for internet capability); *Locke v. Davey*, 540 U.S. 712 (2004)(state funds for Promise Scholarship); *National Endowment For The Arts v. Finley*, 524 U.S. 569 (1998)(grants to qualifying artists for art consistent with public purpose). In contrast, the real issue here is Berkeley's decision to charge the Sea Scouts for the same access granted to others at no charge because the Sea Scouts have refused to forfeit their right to expressive association.

Recognition that equal access to public facilities is a benefit (not a subsidy) demonstrates that the cases relied upon by the Sea Scouts provide the better guide to the proper resolution of this case. And, as the Sea Scouts point out, those cases make it very clear that Berkeley cannot condition eligibility for government benefits on forfeiture of First Amendment rights. As explained below, Berkeley cannot excuse the unconstitutional condition it has placed on eligibility for free access to marina berths on the thin pretext that its nondiscrimination policy focuses on conduct not expression.

II. Denying Government Benefits Due To A Refusal To Admit Members Whose Views Differ From Those A Group Advances Through Expressive Association Is Viewpoint Discrimination Barred By The First Amendment.

The court below approved Berkeley's effort to force the Sea Scouts to include those whose views contradict the opposition to atheism and the homosexual lifestyle which the Sea Scouts further through their expressive association on the grounds that Berkeley's condition turned on conduct and, for this reason, did not penalize the Sea Scouts for their viewpoint on these issues. *Evans*, 38 Cal. 4th at 13-14. This is the second fundamental error underlying the decision below because, as this Court has recognized, insofar as expressive association is concerned, the conduct (association) is the content and "public...disapproval of a tenet of an organization does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organizations expressive message." *Dale*, 530 U.S. at 661. Respect for this holding, itself grounded in a laudable realism well calculated to protect the fundamental right to expressive association, compels the conclusion that Berkeley's effort to condition the Sea Scouts' eligibility on the forced inclusion of members whose views contradict those of the Sea Scouts is an unconstitutional condition tantamount to viewpoint discrimination.

The notion that Berkeley's condition on eligibility for a free berth does not violate the Sea Scouts' expressive association because the condition focuses on conduct, not viewpoint, must be rejected. This Court has never exempted regulations abridging First Amendment rights from searching review based on the facile argument that the regulations restrict conduct not content. Thus in *Healy*, *supra*, this Court

held that student groups could not be denied access to campus facilities and benefits based upon their association with groups that had engaged in unlawful conduct even though the stated grounds for denying access to the college campus was a prohibition of unlawful *conduct* that did not, on its face, target expression. Similarly, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), this Court held that Massachusetts' public accommodation law could not be used to force inclusion of a contingent committed to the homosexual lifestyle even thought the law, on its face, prohibited conduct (*i.e.*, discrimination) not expression. And in *Dale*, *supra*, this Court held that New Jersey's public accommodations law could not be used to force inclusion of homosexuals into the BSA even though the law, on its face, restricted conduct not expression.

In none of these cases did this Court accept the superficial claim that the restriction on expressive association was insulated from meaningful review under the First Amendment because the regulation was a content-neutral regulation of conduct not expression. Quite the contrary, this Court made a realistic appraisal of the situation and found that the conduct at issue was entitled to protection under the First Amendment precisely because the law was applied to expressive conduct. The reality captured by this Court's expressive association precedents is both plain and simply stated: insofar as expressive association is concerned, the conduct is the content and–by its very nature–necessarily reflects the viewpoint of its adherents. Consequently, denying government benefits to persons because of their expressive association is, by its very nature, viewpoint discrimination.

It is true, of course, that Berkeley's application of its nondiscrimination ordinance against the Sea Scouts is indirect because it is a condition of eligibility for a government

benefit. But this does not mean that Berkeley's policy can be insulated from meaningful review under the First Amendment on the thin pretext that the condition turns on conduct not expression for the same reason that this argument has no force where restrictions are direct. Rather, the fact that Berkeley seeks to do indirectly what it cannot do directly simply means that Berkeley's policy is analyzed under this Court's unconstitutional conditions doctrine. If the unconstitutional condition cases mean anything, they mean that government has no legitimate power to condition eligibility for government benefits on silence or expression consistent with government orthodoxy.

Seen in this light, it is evident that Berkeley's effort to condition eligibility for benefits on conduct that effectively makes the Sea Scouts renounce their view on homosexuality and atheism effectively requires the Sea Scouts to forfeit their right to expressive association in exchange for a government benefit which, for this reason, amounts to an unconstitutional condition. In essence, Berkeley demands conduct that contradicts the message conveyed by the Sea Scouts through their expressive association and, in this way, would make the Sea Scout's speak Berkeley's message concerning the homosexual lifestyle and atheism. As this Court recognized in *Dale*, *supra*, such forced association is tantamount to censorship or compelled speech. *See Dale*, 530 U.S. at 656 (recognizing that forced inclusion of homosexual would "significantly affect" expression). As this Court took pains to point out in *Dale*, such forced inclusion is barred by the First Amendment precisely because "public...disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Dale*, 530 U.S. at 661. And from this it follows that discrimination against a group

because of conduct pursued to promote the views of an organization is tantamount to viewpoint discrimination. *See, e.g., Healy*, 408 U.S. at 187-88 (noting that "The College...may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.").

Taken together, these cases demonstrate that the decision below must be reversed because it is critically flawed and wholly at odds with this Court's controlling precedent. The court below failed to see that Berkeley's policy relates to a government benefit not a subsidy.[2] And the court below failed to see that Berkeley's policy requires a forced inclusion at odds with the Sea Scouts' viewpoint and, as a result, conditions eligibility for a government benefit on the Sea Scouts' forfeiture of their right to express their views on these issues by means of expressive association. As explained

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[2] Indeed, even if the free berth that Berkeley makes available to nonprofits performing public service were properly classified as a "subsidy" within the meaning of this Court's precedent, Berkeley's effort to force the Sea Scouts to alter–in effect repudiate–the views conveyed by their expressive association would nonetheless represent an unconstitutional condition. As explained *infra*, Berkeley's decision to deny the subsidy because the Sea Scouts refuse to include individuals whose views contradict the views that the Sea Scouts seek to advance through expressive association constitutes illicit viewpoint discrimination. This Court has never allowed government subsidies to be conditioned on viewpoint discrimination. *See*, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995)(First Amendment barred government from viewpoint discrimination in funding of private speech); *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001)(government funding of legal counsel to represent indigent was funding of private speech which could not be restricted to bar arguments challenging existing law).

infra, the court below misread (and misapplied) this Court's precedent on its way toward reaching a conclusion that flies in the face of the fundamental principle animating this Court's unconstitutional conditions analysis, *i.e.*, "what the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan*, 497 U.S. at 77-78.

III. The Court Below Misread And Misapplied Controlling Precedents.

Because the court below focused on form, not substance, it misread and misapplied controlling precedent. Its reliance on *Bob Jones University* and *Grove City College* is wholly mistaken for the simple reason that in each of these cases the condition on eligibility for government benefits was based upon a compelling state interest. *See Evans*, 38 Cal. 4th at 12-13 & n. 6. The court below misread this Court's decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983), because it failed to appreciate that eradicating racial discrimination was seen as a compelling interest that the government could advance directly. As a result, enforcing this interest indirectly, by conditioning eligibility for a tax exemption upon nondiscrimination, was not an unconstitutional condition.

Similarly, *Grove City College v. Bell*, 465 U.S. 555 (1984), arose from efforts to eradicate sex discrimination indirectly *via* conditions for participation in federal financial aid programs. Here again, the effort to eradicate sex discrimination indirectly, as a condition for a government benefit, was not an unconstitutional condition because, as this Court recognized in *Dale*, *supra*, eliminating sex discrimination is a compelling state interest. *See Dale*, 530 U.S. at 657 ("We recognized in cases such as *Roberts* and

Duarte that States have a compelling interest in eliminating discrimination against women in public accommodations). Indeed, long before *Grove City College* was decided this Court had upheld government regulations outlawing speech in furtherance of sex discrimination, despite a First Amendment challenge, precisely because it was speech in furtherance of conduct which the City of Pittsburgh had made unlawful consistent with the First Amendment. *See Pittsburgh Press Co. v. Pittsburgh Commission On Human Relations*, 413 U.S. 376 (1973)(human relations ordinance which prohibited newspaper from carrying sex designated advertising columns did not violate newspaper publishers First Amendment rights because discrimination in employment is illegal commercial activity).

In short, neither of these cases involved unconstitutional conditions precisely because each concerned a compelling state interest that the government could command directly and, as a result, there was no question that government could further that objective indirectly by making compliance a condition of eligibility for a government benefit. *Cf. FAIR*, 126 S.Ct. at 1307 (Solomon Amendment conditioning eligibility for federal funds on providing equal access to military recruiters was not an unconstitutional condition because Congress could require equal access pursuant to its power to raise and support armies and provide and maintain a navy.).

The opposite is true here: because the First Amendment prevents Berkeley from imposing its nondiscrimination ordinance directly, Berkeley cannot enforce its policy indirectly as a condition of elibility for benefits. Accordingly, Berkeley's policy does place an unconstitutional condition on the receipt of a government benefit.

In a similar way the court below failed to appreciate the true thrust of this Court's decision in *Healy*, *supra*. *See Evans*, 38 Cal. 4th at 19-20. There is no question that government could punish disruptive or violent conduct because, as this Court took pains to point out in *Healy*, violent or disruptive conduct is not protected by the First Amendment. *See Healy*, 408 U.S. at 192-94 (noting that exclusion from campus would be justified if supported by evidence of unlawful conduct). But the whole point of *Healy* is that students could not be denied benefits based on the exercise of their protected right to associate with others–even if those others had engaged in unlawful activity. *Id.* at 194.

This case, in contrast, involves the Sea Scouts' exercise of their First Amendment right of association. Nothing in *Healy* supports the principle that expressive conduct protected by the First Amendment can be punished on the pretext that the purpose of the restriction is to regulate unlawful conduct. If that were the law, then *Healy* would have been decided differently. Instead, *Healy* requires the state to ensure that its regulation punishes only the unlawful conduct–not the lawful conduct protected by the First Amendment. The court below failed to recognize this distinction and, as a result, read *Healy* as if it allowed Berkeley to punish conduct protected by the First Amendment simply because Berkeley choose to make that conduct unlawful. That reading of *Healy* is absurd–and utterly at odds with the cases cited earlier in which this Court has rejected efforts to restrict the right to associate by means of laws prohibiting conduct protected by the First Amendment.

CONCLUSION

Amicus curiae Thomas More Law Center respectfully requests that this Court grant the Sea Scouts' petition for a *writ of certiorari* and strike down the unconstitutional condition Berkeley has placed on the Sea Scouts' eligibility for the benefit Berkeley extends to nonprofit organizations. This Court has long acknowledged that "[i]f the government could deny benefits to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would be in effect penalized and inhibited." *O'Hare Truck Service*, 518 U.S. at 717. For this very reason, Berkeley cannot force the Sea Scouts to include individuals whose views contradict the Sea Scouts' opposition to the homosexual lifestyle and atheism as a condition of eligibility for a government benefit. As this Court has ruled in other cases, "[s]uch interference with constitutional rights is impermissible." *Id.*

Respectfully Submitted,

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